IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 1117.

ZENITH RADIO CORPORATION, A CORPORATION,
Petitioner,

vs.

HAZELTINE RESEARCH, INC., A CORPORATION,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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APPENDIX.

RELEVANT DOCKET ENTRIES.

Cases Nos. 15246, 15563.

Date	Filings-Proceedings
6/17/69	Filed certified copy judgment of Supreme Court affirming in part and reversing in part as to costs, & remanding to this Court for further proceedings in conformity with opinion.
6/17/69	Filed original & 3 copies of motion of appellant Hazeltine Research, Inc. for the scheduling of supplemental briefs & oral argument on the issues remanding undecided in this Court, exhibit & service (15563).
6/23/69	Filed original & 3 copies of appellee's answer to motion for scheduling of supplemental brief, etc., affidavit & service. (15563)
6/23/69	Filed original & 3 copies of appellee's motion to disqualify Judge Cummings from further participation, etc., affidavit & service (15563)
6/25/69	Filed original & 3 copies of appellant's motion to extend time to respond to motion & answer filed by appellee on 6/23/69, affidavit & service. (15563).
6/30/69	Entered order granting issuance of mandate & denying all other motions. (15247-15563-4)

7/15/69 Filed original & 3 copies of appellant's reply memo as to the S. C. decision & the question left for decision by this court, affidavit & service (15563).

8/29/69 Filed 25 copies of memorandum of Zenith Radio Corp. as to the Supreme Court decision & the effect of its opinion, etc., service (15563).

8/29/69 Filed 25 copies of supplemental authorities of Hazeltine, etc. service (15563).

9/ 5/69 Filed 25 copies of appellant's reply to appellee's memorandum as to Supreme Court decision, service (15563).

9/ 5/69 Filed original & 3 copies of Hazeltine's motion for leave to file reply to Zenith's memorandum as to Supreme Court opinion, affidavit & service (15563).

9/ 5/69 Entered order granting motion of 9/5/69. (15563).

9/17/69 Filed original & 3 copies of appellee's motion for leave to file its brief (reply) to HRI's memo, etc., service & affidavit (15563)

10/27/69 Entered judgment vacated & that this cause be & it is hereby remanded to the said District Court for further proceedings consistent with the views expressed in the Opinion, further ordered that the costs of these appeals be divided equally between the parties (15563).

10/27/69 Filed opinion by Judge Kiley.

11/ 5/69 Filed original & 3 copies of appellee's motion to stay mandate, affidavit & service (15563).

11/ 6/69 Entered order granting motion of 11/5/69 (mandate stayed for 30 days) (15563).

12/ 5/69	Filed original & 3 copies of appellee's motion to stay mandate affidavit & service (15563).
12/ 8/69	Entered order granting motion of 12/5/69 (mandate stayed pending disposition of the Zenith petition for writ of mandamus). (15563).
1/30/70	Filed notice of docketing in Supreme Court as No. 1117 (15563).
3/20/70	Filed notice of granting writ of certiorari. (15563)
3/26/70	Filed stip re record on appeal (15563)

SUPREME COURT OF THE UNITED STATES

No. 49.—OCTOBER TERM, 1968.

ZENITH RADIO CORPORATION, *Petitioner*, *vs.* HAZELTINE RESEARCH, INC., et al. } On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

[May 19, 1969.]

MR. JUSTICE WHITE delivered the opinion of the Court.

Petitioner Zenith Radio Corporation (Zenith) is a Delaware Corporation which for many years has been successfully engaged in the business of manufacturing radio and television sets for sale in the United States and foreign countries. A necessary incident of Zenith's operations has been the acquisition of licenses to use patented devices in the radios and televisions it manufactures, and its transactions have included licensing agreements with respondent Hazeltine Research, Inc. (HRI), an Illinois corporation which owns and licenses domestic patents, principally in the radio and television fields. HRI is the wholly owned subsidiary of respondent Hazeltine Corporation (Hazeltine), a substantially larger and more diversified company that has among its assets numerous foreign patents—including the foreign counterparts of HRI's domestic patents —which it licenses for use in foreign countries.

Until 1959, Zenith had obtained the right to use all HRI domestic patents under HRI's so-called standard package license. In that year, however, with the expiration of Zenith's license imminent, Zenith declined to accept HRI's offer to renew, asserting that it no longer required a license

from HRI. Negotiations proceeded to a stalemate, and in November 1959, HRI brought suit in the Northern District of Illinois, claiming that Zenith television sets infringed HRI's patents on a particular automatic control system. Zenith's answer alleged invalidity of the patent asserted and noninfringement, and further alleged that HRI's claim was unenforceable because of patent misuse as well as unclean hands through conspiracy with foreign patent pools. On May 22, 1963, more than three years after its answer had been filed, Zenith filed a counterclaim against HRI for treble damages and injunctive relief, alleging violations of the Sherman Act by misuse of HRI patents, including the one in suit, as well as by conspiracy among HRI, Hazeltine, and patent pools in Canada, England, and Australia. Zenith contented that these three patent pools had refused to license the patents placed within their exclusive licensing authority, including Hazeltine patents, to Zenith and others seeking to export American-made radios and televisions into those foreign markets.

The District Court, sitting without a jury, ruled for Zenith in the infringement action, 239 F. Supp., at 68-69, and its judgment in that respect, which was affirmed by the Court of Appeals, 388 F. 2d, at 30-33, is not in issue here. On the counterclaim, the District Court ruled, first, that HRI had misused its domestic patents by attempting to coerce Zenith's acceptance of a five-year package license, and by insisting on extracting royalties from unpatented products. 239 F. Supp., at 69-72, 76-77. Judgment was entered in Zenith's favor for treble the amount of its actual damages of approximately $50,000, and injunctive relief against further patent misuse was awarded. Second, HRI and Hazeltine were found to have conspired with the foreign patent pools to exclude Zenith from the Canadian, English, and Australian markets. Hazeltine had granted the pools the exclusive right to license Hazeltine patents in

their respective countries and had shared in the pools' profits, knowing that each pool refused to license its patents for importation and that each enforced its ban on imports with threats of infringement suits. HRI, along with its coconspirator, Hazeltine, was therefore held to have conspired with the pools to restrain the trade or commerce of the United States, in violation of § 1 of the Sherman Act, 15 U. S. C. § 1, and was liable for injury caused Zenith's foreign business by the operation of the pools. 239 F. Supp., at 77-78. Total damages with respect to the three markets, when trebled, amounted to nearly $35,000,000.[1] Judgment

1. In its initial findings, handed down on January 25, 1965, 239 F. Supp., at 76, the District Court concluded that Zenith had suffered actual damages of $16,238,872 as a result of the restraints imposed by the three pools upon Zenith's export business during the four-year damage period:

Canada:	
Television	$5,826,896
Radio	470,495
England:	
Television	8,079,859
Radio	1,169,067
Australia:	
Television	625,786
Radio	66,769
Total	16,238,872

On April 5, 1965, the District Court entered partial judgment, awarding Zenith treble damages for patent misuse and treble damages with respect to Canada, but reserving jurisdiction for further hearings on damages in the English and Australian markets. The further proceedings were held in October and November 1965, after which the District Court amended its findings on damages for England and Australia:

England:	
Television	$4,312,924
Radio	745,102
Australia:	
Television	223,508
Radio	24,952
Total	5,306,486

in this amount was awarded Zenith, along with injunctive relief against further participation in any arrangement to prevent Zenith from exporting electronic equipment into any foreign market.

Relying upon its finding that HRI and Zenith had stipulated before trial that HRI and Hazeltine were to be considered as one entity for purposes of the litigation, see 239 F. Supp., at 69, the judgments for treble damages and injunctive relief, both with respect to patent misuse and conspiracy, were entered against Hazeltine as well as against the named counter-defendant, HRI.

On appeal by HRI and Hazeltine, the Court of Appeals set aside entirely the judgments for damages and injunctive relief entered against Hazeltine, ruling that the District Court lacked jurisdiction over that company and that the stipulation relied upon by the District Court was an insufficient basis for entering judgment against Hazeltine. 388 F. 2d, at 28-30. With respect to Zenith's patent misuse claim, the Court of Appeals affirmed the treble damage award against HRI, but modified in certain respects the District Court's injunction against further misuse. 388 F. 2d, at 33-35, 39.

The Court of Appeals also reversed the treble damage award for conspiracy to restrain Zenith's export trade. Without reaching any of the other issues presented by the appeal on this phase of the case, the court held that Zenith had failed to sustain its burden under § 4 of the Clayton

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These revisions reflect the proof submitted at the further proceedings, showing that government embargoes in England and Australia, in effect until 1959 and 1960 respectively, precluded entry by Zenith into the English and Australian markets. The District Court found, with respect to England, that because of the embargoes, Zenith's damages were zero for the first year of the damage period, 50% of the figure initially accepted by the court for the second year, 75% for the third, and 100% for the fourth. With respect to Australia, the District Court adopted a similar 0-50-75-100% revision of the original figures used by the court in computing the damage findings of January 25, 1965.

Act, 15 U. S. C. § 15, to prove the fact of damage—injury to its business—within the relevant four-year period preceding May 22, 1963, the date Zenith's counterclaim was filed.[2] Finally, the Court of Appeals struck the injunction against HRI's participation in conspiracies restricting Zenith's trade in foreign markets.

We granted certiorari, 391 U. S. 933, to consider among other things the question whether the Court of Appeals properly discharged its appellate function under Rule 52 (a) of the Federal Rules, which specifies that the findings of fact made by a District Court sitting without a jury are not to be set aside unless "clearly erroneous."

I. The Judgment Against Hazeltine.

The named plaintiff in the patent infringement complaint which began this litigation was HRI, not its parent, Hazeltine; Zenith's counterclaim named only HRI as the "counter-defendant," identifying HRI and Hazeltine as "counter-defendant and its parent." After Zenith had filed its answer and had delivered a draft of its counterclaim to HRI's attorneys—both the answer and the counterclaim alleging that HRI had unlawfully conspired with Hazeltine and foreign patent pools—HRI and Zenith stipulated that "for purposes of this litigation plaintiff

2. The record discloses that Zenith, HRI, and the courts below all considered the damage period to be the four years prior to the date on which Zenith filed its counterclaim. No argument was made that the counterclaim, in whole or in part, related back to an earlier pleading, thereby expanding the damage period to include years prior to 1959. Cf. *Bull* v. *United States*, 295 U. S. 247, 262 and n. 10 (1935); *Cold Metal Process Co.* v. *E. W. Bliss Co.*, 285 F. 2d 231 (C. A. 6th Cir. 1960), cert. denied, 366 U. S. 911 (1961). Compare Fed. Rule Civ. Proc. 15 (c) (amended pleading relates back to date of original pleading if the "claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading").

and its parent Hazeltine Corporation will be considered to be one and the same company."

On May 22, 1963, two weeks after the stipulation had been signed, Zenith filed its counterclaim, seeking money damages from HRI and an injunction against HRI and those "in privity" with it. Hazeltine was not served with the counterclaim and was not named as a party, although it was alleged to be a coconspirator with HRI and the foreign patent pools. Hazeltine made no appearance in the litigation until Zenith proposed that judgment be entered against it, at which time Hazeltine filed a "special appearance." Insofar as the record reveals, Hazeltine did not formally participate in the proceedings until after the District Court had entered its initial findings of fact and conclusions of law. On April 5, 1965, after Hazeltine's special appearance, the trial judge entered judgment against Hazeltine as well as HRI, thereby rejecting Hazeltine's objection that the court was without jurisdiction over it. Apparently, the trial court based its decision on the pretrial stipulation[3] and its earlier finding that:

"The parties stipulated that for purposes of this

3. During the proceedings before the District Court on April 2, 1965, the trial judge noted: "Well, of course, Hazeltine Corporation wasn't a party to the lawsuit." The court's reliance upon the stipulation as a basis for its decision to enter judgment against Hazeltine as well as HRI is reflected by the interchanges between the court and counsel for Hazeltine during those proceedings. An example is the following:

"Mr. Kayser [Counsel for Hazeltine]: . . . Could anyone really believe for a minute that if he had any thought of bringing the parent into this lawsuit that he would not have named them and that he would be relying on this stipulation which was intended to simplify and expedite the trial? Would any lawyer who has been practicing for two years expect to hold somebody liable on a judgment when he didn't even name them? He relied on some pretrial stipulation.

"The Court: You mean that pretrial stipulations are worthless?"

> litigation Hazeltine Research, Inc., and its parent, Hazeltine Corporation, would be considered as one entity operating as a patent holding and licensing company, engaged in the exploitation of patent rights in the electronics industry in the United States and in foreign countries." 239 F. Supp., at 69.

The Court of Appeals was quite right in vacating the judgments against Hazeltine. It is elementary that one is not bound by a judgment *in personam* resulting from litigation in which he is not designated as a party or to which he has not been made a party by service of process. *Hansbury* v. *Lee,* 311 U. S. 32, 40-41 (1940). The consistent constitutional rule has been that a court has no power to adjudicate a personal claim or obligation unless it has jurisdiction over the person of the defendant. *E. g., Pennoyer* v. *Neff,* 95 U. S. 714 (1878); *Vanderbilt* v. *Vanderbilt,* 354 U. S. 416, 418 (1957).

Here, Hazeltine was not named as a party, was never served and did not formally appear at the trial. Nor was the stipulation an adequate substitute for the normal methods of obtaining jurisdiction over a person or a corporation. The stipulation represented HRI's agreement to be bound by and to be liable for the acts of its parent, but it was signed only by HRI, through its attorney, Dodds. Hazeltine did not execute the stipulation, and Dodds, although an officer of Hazeltine, did not purport to be signing on its behalf. The trial court apparently viewed the stipulation as binding Hazeltine, as equivalent to an entry of appearance, or as consent to entry of judgment against it. The stipulation on its face, however, hardly warrants this construction, and if there were other circumstances which justified the trial court's conclusion, the findings do not reveal them.

Perhaps Zenith could have proved and the trial court might have found that HRI and Hazeltine were *alter*

egos; but absent jurisdiction over Hazeltine, that determination would bind only HRI. If the *alter ego* issue had been litigated, and if the trial court had decided that HRI and Hazeltine were one and the same entity and that jurisdiction over HRI gave the court jurisdiction over Hazeltine, perhaps Hazeltine's appearance before judgment with full opportunity to contest jurisdiction would warrant entry of judgment against it. But that is not what occurred here. The trial court's judgment against Hazeltine was based wholly on HRI's stipulation. HRI may have executed the stipulation to avoid litigating the *alter ego* issue,[4] but this fact cannot foreclose Hazeltine, which has never had its day in court on the question of whether it and its subsidiary should be considered the same entity for purposes of this litigation.

Likewise, were it shown that Hazeltine through its officer, Dodds, in fact controlled the litigation on behalf of HRI, and if the claim were made that the judgment against HRI would be *res judicata* against Hazeltine because of this control, that claim itself could be finally adjudicated against Hazeltine only in a court with jurisdiction over that company.[5] See *G. & C. Merriam Co.*

4. There is some indication that the genesis of the stipulation was a pretrial conference, when a question was raised as to whether or not a subpoena served upon HRI could reach certain records of Hazeltine relating to the latter's foreign patents. Hazeltine, of course, argues that the stipulation's only purpose and effect were to facilitate discovery and trial by obviating the necessity of litigating whether or not Zenith could "pierce the corporate veil" between HRI and its parent.

5. In its brief in this Court, Zenith seems to argue that Hazeltine is estopped to deny that it is bound by the stipulation. Not only was HRI's counsel, Dodds, an officer of Hazeltine, but also Ruestow and Westermann, Hazeltine's general patent counsel and general counsel, were present during trial and failed to "repudiate" the construction allegedly given the stipulation by the parties at trial to the effect that it bound Hazeltine to any adjudication on the counterclaim. We find this theory untenable on the

v. *Saalfield*, 241 U. S. 22 (1916); *Schell* v. *Peter Eckrich & Sons, Inc.*, 365 U. S. 260 (1961).

Neither the judgment for damages nor the injunction against Hazeltine was proper. Although injunctions issued by federal courts bind not only the parties-defendant in a suit, but also those persons "in active concert or participation with them who receive actual notice of the order by personal service or otherwise," Fed. Rule Civ. Proc. 65 (d), a nonparty with notice cannot be held in contempt until shown to be in concert or participation. It was error to enter the injunction against Hazeltine, without having made this determination in a proceeding to which Hazeltine was a party.[6]

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record of this case, for the references during trial to the stipulation are equally consistent with the interpretation advanced by Hazeltine that the stipulation merely eliminated the necessity for Zenith to perform the time-consuming task of piercing the corporate veil in proving its counterclaim against HRI. Also, Ruestow and Westermann were called as witnesses during trial, and assuming they were present throughout the trial—a fact which is neither proved nor disproved by the record—their failure to repudiate Zenith's proposed construction of the stipulation is entirely consistent with the proposition that they were present only as witnesses, and not as authorized representatives for a person who might be bound by the litigation.

6. Just as the *alter ego* issue was not litigated after Hazeltine had made its special appearance and while it had an opportunity to be heard, see p. 8, *ante*, so the District Court evidently did not rely upon anything more than the stipulation as a basis for entering the injunction against Hazeltine as well as HRI. The record does not support the contention, implicit in Zenith's brief, that when Hazeltine appeared to contest jurisdiction it was found by the District Court to be "in active concert and participation" with HRI and that, by entering its special appearance, Hazeltine consented to be bound by such a finding. See generally Dobbs, The Validation of Void Judgments: The Bootstrap Principle (pts. 1 and 2), 53 Va. L. Rev. 1003, 1241 (1967).

II. The Foreign Patent Pools.

A. *The Treble-Damage Award.*

HRI's major points in the Court of Appeals were that no injury to Zenith's business during the damage period had been proved; that if Zenith had suffered injury, it resulted wholly or partly from conduct prior to May 22, 1959, and to this extent was barred by the statute of limitations and by Zenith's 1957 settlement of certain antitrust litigation against RCA, General Electric, and Western Electric, which had the effect of releasing HRI from all liability for pre-settlement acts of the foreign patent pools;[7] that the Hazeltine companies had not illegally conspired with foreign pools; and that the damage award was excessive. Passing the other issues pressed by HRI, including the limitations defense, the Court of Appeals held that Zenith had failed to prove any injury to its export business during the damage period which resulted from pool activities either before or after the beginning of the damage period, and that the District Court's finding to the contrary was clearly erroneous.[8]

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7. Although HRI and Hazeltine were not parties to this prior litigation and did not enter the settlement agreement, HRI urged that all joint tortfeasors, including HRI and Hazeltine, were released from liability for injuries flowing from the pre-settlement acts of the pools. The 1957 release appears to be relevant only to Zenith's claim for injury to its Canadian trade; the embargoes in England and Australia were thought by the District Court to preclude any injury from acts of the English and Australian pools, and the embargoes were not lifted until well after the settlement was executed.

8. The Court of Appeals did not disturb, nor do we, the findings of the District Court that HRI and Hazeltine conspired with the Canadian pool to deny patent licenses to companies seeking to export American-made goods to Canada. Accepting these findings, we have no doubt that the Sherman Act was violated. See, *e. g.*, *Timken Roller Bearing Co.* v. *United States*, 341 U. S. 593, 599

We have concluded that the Court of Appeals erred in setting aside the District Court's decision with respect to the fact of damage in Canada. Zenith's evidence, although by no means conclusive, was sufficient to sustain the inference that Zenith had in fact been injured to some extent[9] by the Canadian pool's restraints upon imports of radio and television sets. On the other hand, we agree with the Court of Appeals that the District Court erred as to the English and Australian markets.

1. *The Canadian Pool.*

The findings of the District Court with respect to the operations of the Canadian pool may be briefly summarized. The Canadian patent pool, Canadian Radio Patents, Ltd. (CRPL), was formed in 1962 by the General Electric Company of the United States through its subsidiary, Canadian General Electric Co., and by Westinghouse through its Canadian subsidiary. The pool was made up largely of Canadian manufacturers, most of which were subsidiaries

(1951); *Continental Ore Co.* v. *Union Carbide & Carbon Corp.*, 370 U. S. 690, 704 (1962). Once Zenith demonstrated that its exports from the United States had been restrained by pool activities, the treble damage liability of the domestic company participating in the conspiracy was beyond question. *Continental Ore Co.* v. *Union Carbide & Carbon Corp., supra.* Compare *American Banana Co.* v. *United Fruit Co.*, 213 U. S. 347 (1909); *United States* v. *Aluminum Co. of America*, 148 F. 2d 416, 443 (C. A. 2d Cir. 1950). Although patent rights are here involved, the same conclusions follow. See, for example, *United States* v. *Line Material Co.*, 333 U. S. 287, 305-315 (1948); *United States* v. *Singer Mfg. Co.*, 374 U. S. 174, 196-197 (1963).

9. Zenith's burden of proving the fact of damage under § 4 of the Clayton Act is satisfied by its proof of *some* damage flowing from the unlawful conspiracy; inquiry beyond this minimum point goes only to the amount, and not the fact of damage. It is enough that the illegality is shown to be a material cause of the injury; a plaintiff need not exhaust all possible alternative sources of injury in fulfilling his burden of proving compensable injury under § 4. *Continental Ore Co.* v. *Union Carbide & Carbon Corp.*, 370 U. S. 690, 702 (1962); *Perma Life Mufflers, Inc.* v. *International Parts Corp.*, 392 U. S. 134, 143-144 (1968) (concurring opinion).

of American companies. The pool for many years had the exclusive right to sublicense the patents of its member companies and also those of Hazeltine and a number of ohter foreign concerns. About 5,000 patents were available to the pool for licensing, and only package licenses were granted, covering all patents in the pool and strictly limited to manufacture in Canada. No license to importers was available. The chief purpose of the pool was to protect the manufacturing members and licensees from competition by American and other foreign companies seeking to export their products into Canada.

CRPL's efforts to prevent importation of radio and television sets from the United States were highly organized and effective. Agents, investigators, and manufacturer and distributor trade associations systematically policed the market; warning notices and advertisements advised distributors, dealers, and even consumers against selling or using unlicensed equipment. Infringement suits or threats thereof were regularly and effectively employed to dissuade dealers from handling American-made sets.

For many years Zenith attempted to establish distribution in Canada, but distributors were warned off by the pool, and Zenith's efforts to secure a license for American-made goods were unsuccessful. Zenith then brought an antitrust suit against RCA, General Electric, and Western Electric.[10] This litigation was favorably settled, Zenith receiving, among other things, worldwide licenses on patents owned by the named defendants. Armed with these and other licenses, Zenith in 1958 began exporting radio and television products to Canada. It was promptly informed by CRPL that to continue business in Canada, Zenith would be required to sign CRPL's standard license, which did not permit importation, and that to sell in

10. Zenith's antitrust claim was asserted as a counterclaim in a patent infringement suit brought by RCA against Zenith and its subsidiary, the Rauland Corporation.

Canada it must manufacture there. Zenith was notified at the time that it was infringing at least one of Hazeltine's patents which had been placed with CRPL for licensing in Canada. Soon after this demand by CRPL, HRI began its infringment suit against Zenith.

Some of the trial court's findings describing the operations of the Canadian pool and its "drastic" impact upon Zenith's foreign commerce did not date the events or state whether they had occurred before or after May 22, 1959. The damage award was confined to injuries sustained during the statutory period, but the trial court apparently deemed it immaterial whether the damage-causing acts occurred before or after the start of the damage period. Damages were awarded on the assumption that Zenith, absent the conspiracy, would have had 16% of the Canadian television market on May 22, 1959, and throughout the damage period rather than its actual 3% share.[11] Since the failure to have 16% of the market on the first day of the damage period was ascribed to pool operations, those operations must have occurred prior to May 22, 1959. Some part of the damages awarded, therefore, necessarily resulted from pre-damage period conduct.[12]

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11. The computation of damages, prepared by Zenith's experts and accepted by the District Court, see 239 F. Supp., at 76, reflects a comparison between Zenith's percentage share of the United States television market, ranging from 15.6% in 1959 to 21.7% in 1963, and Zenith's actual share of the Canadian market during the same period, ranging from 3.1% in 1959 to 5.2% in 1961 and down to 3.2% in 1963. Although we discuss only the measure of damages utilized for computing Zenith's injury in the Canadian television market, a comparable method was employed to determine Zenith's lost radio sales.

12. On November 22, 1965, during the further proceedings held to consider damages for England and Australia, Zenith's executive vice-president and treasurer, Kaplan testified:

> "In Canada, our assumption was that we commenced the period starting June 1, 1959, as if we had had a full blown organization, and had enjoyed the benefits of doing business there for years prior to that date."

The Court of Appeals reversed the District Court because it considered the evidence insufficient to prove the fact of any damage to Zenith after May 22, 1959. Having put aside HRI's statute of limitations defense, belatedly raised in the District Court and pressed in the Court of Appeals,[13] the import of the court's decision was that Zenith had not been damaged after May 22, 1959, by any act of the pool, whether occurring before or after that date. The Court of Appeals' overriding judgment—as it had to be if its no-injury rationale were to meet claims of damage period injury from pre-damage period conduct—was that Zenith would have done no more business in Canada after May 22, 1959, had the patent pool never operated in that country.

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13. HRI's answer to Zenith's counterclaim did not plead a statute of limitations defense. However, in the course of proceedings after entry of the District Court's initial findings of fact and conclusions of law, but before judgment, the trial court granted the oral motion of HRI's new counsel for "leave to file" defenses based on the statute of limitations and on the release given by Zenith pursuant to the 1957 settlement agreement. The thrust of the former was primarily that the findings as to Canada had erroneously included damages resulting from conduct occurring prior to May 22, 1959. The trial court, without further mention of these defenses, forthwith refused to set aside or amend the damage award as to Canada, thus either rejecting the statute of limitations defense or considering it to have been waived under Fed. Rule Civ. Proc. 12 (h), as urged by Zenith in both the District Court and the Court of Appeals.

Zenith itself had requested damages only for the four-year period prior to the filing of its counterclaim, and the findings of the District Court expressly limited the damages awarded to those occurring "during the 4-year statutory damage period." 239 F. Supp., at 76. The Court of Appeals, although not purporting to pass on the statute of limitations defense, referred to the "four year damage period" and identified it as "[f]our years prior to the May 22, 1963, filing date of Zenith's counterclaim. 15 U. S. C. Sec. 15b." 388 F. 2d, at 35 and n. 4. The parties have not argued the matter here, and we make no further effort to penetrate the confusion surrounding this issue or to deal with the question of whether damage period injury from pre-damage period conduct is recoverable where an unwaived statute of limitations defense is properly asserted.

The Court of Appeals was clearly in error. The evidence was quite sufficient to sustain a finding that competing business concerns and patentees joined together to pool their Canadian patents, granting only package licenses and refusing to license imported goods. Their clear purpose was to exclude concerns like Zenith from the Canadian market unless willing to manufacture there. Zenith, consequently, was never able to obtain a license. This fact and the pool's vigorous campaign to discourage importers, distributors, dealers, and consumers from selling, handling, or using unlicensed foreign merchandise effectively prevented Zenith from making any headway in the Canadian market until after the 1957 settlement with RCA and its co-defendants. And even in 1958, when Zenith undertook in earnest to establish its distribution system in Canada and to market its merchandise, Zenith was met with further pool advertisements threatening action against imported goods and further notifications, continuing past May 22, 1959, that its products were infringing pool patents and that no license was available unless Zenith manufactured in Canada.

This evidence clearly warrants the inference that CRPL's past conduct interfered with and made more difficult the distribution of Zenith products in 1959 and later years. The District Court could reasonably conclude that the cumulative effects of the pool's campaign against imported goods had consequences lasting well into the damage period. It could also rationally be found from the evidence that Zenith, beginning in 1958, could not have reached its maximum potential by May 22, 1959, that the pool had effectively prevented an earlier beginning, and that Zenith therefore suffered damage during the damage period from having a smaller share of the market than it would have had if the pool had never existed.

We also conclude that the record evidence is sufficient to support a finding of damage resulting from events occurring after the beginning of the damage period. We need not merely assume that the Canadian pool continued throughout the period of this suit, as we are entitled to do in the absence of clear evidence of its termination. See, *e.g.*, *Local 167* v. *United States*, 291 U. S. 293, 297-298 (1934); *United States* v. *Oregon State Medical Society*, 343 U. S. 326, 333 (1952). HRI frankly conceded the continuation of the pool before the District Court,[14] and it appears sufficiently clear that throughout this time Zenith was deprived of what had always been refused it—a license on pool patents permitting it to sell American-made merchandise in Canada.

On May 12, 1959, the pool manager conferred with Zenith's vice president, informing him that Zenith was infringing pool patents and would require a license, but that licenses were granted only for local manufacture. This was followed on June 5, 1959, by a letter stating without reservation that Zenith receivers were infringing and enclosing the pool's standard license form. This was nothing more nor less than a demand during the damage period that Zenith either manufacture in Canada and take the stand-

14. On April 1, 1965, during the further proceedings held by the District Court before judgment, counsel for HRI stated:

> "Now what [counsel for Zenith] is really trying to sell this court is the idea that if he can show that these pools continued after 1957 and, as he defines the pools, yes, yes, they did. There is no question about it, that these arrangements in relation to patents—that characterized necessarily as he characterizes them, but that these arrangements have continued and, so far as I know, are in existence today. There is no question about that."

HRI does contend, however, that the ties between the Canadian pool and the Hazeltine companies were broken in December 1965, when Hazeltine secured an early termination of its licensing agreement with CRPL. See n. 25, *infra*.

ard package license or cease its activities in that country.[15] There is no evidence that the pool ever retreated from that position during the next four years.

Zenith thus continued to operate without a patent license unburdened by conspiratorial conduct and granted on terms which would satisfy the antitrust laws. This deprivation in itself necessarily had an impact on Zenith and constituted an injury to its business. We find singularly unpersuasive the argument that Zenith was as well off without a license as with one. This is little more than an assertion that pool licenses, from which CRPL and its participants enjoyed substantial income, were without value. Without the license, doing business in Canada obviously involved weighty risks for Zenith itself, besides requiring it to convince the trade that it could legally and effectively do business without clearance from CRPL.[16]

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15. That Zenith failed to make a formal request for a CRPL license during the damage period can properly be attributed to Zenith's recognition that such a request would have been futile. The pool had made its position entirely clear, and under these circumstances the absence of a formal request is not fatal to Zenith's case. See *Continental Ore Co.* v. *Union Carbide & Carbon Corp.*, 370 U. S. 690, 699-702 (1962); *Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.*, 392 U. S. 481, 487, n. 5 (1968).

16. In 1960, the Report of the Royal Commission on Patents, Copyright and Industrial Designs was published. This Report described the magnitude of the risk taken by Zenith and its distributors in selling imported products in Canada:

> "The portfolio in respect of which CRPL had the right to grant licences consisted of 5,000 patents, and in the absence of a licence from CRPL it is doubtful if anyone could sell in Canada a radio or television receiver.
>
> "CRPL indicated that it does not grant a licence to any importer of radio or television receivers . . . . It is particularly in respect of the policy of CRPL in precluding importers from bringing into Canada radio and television receivers that the complaint was made to this Commission.
>
> "It was stated to be the policy of CRPL to enforce its patent rights against any person who sells in Canada an imported radio or television receiver which infringes any one or more of the patents in its portfolio . . . ."

Of course, Zenith determined to take these risks, serious as they were. Although HRI brought the instant litigation claiming infringement of an HRI domestic patent, the foreign counterpart of which had been made available to the Canadian pool by Hazeltine, Zenith persevered in its Canadian efforts. The claim is now pressed, and the Court of Appeals so held, that the pool bothered neither Zenith nor its distributors after mid-1959 and that Zenith ran the gauntlet so successfully that not having a license made no difference whatsoever.

It is true that the record discloses no specific instance of subsequent infringement suits or threats against Zenith's existing or potential distributors or dealers. But there is evidence that the pool was not dormant after May 1959. The record contains a letter from the pool to a distributor of Motorola products containing clear warnings against handling unlicensed, imported merchandise.[17] More significant, the fair import of the testimony by Zenith officers was that the pool remained active during the damage period and prevented Zenith from establishing an effective distribution system throughout Canada. Zenith was able to obtain independent distributors in the Western Provinces, but it was unable to do so in the Central and the Maritime Provinces, where it necessarily relied on its own subsidiaries for distribution. These officers, experienced businessmen, also testified to the similarities between the Canadian and American markets, attributing Zenith's much poorer Ca-

17. This letter, brought to Zenith's attention by an ex-Zenith dealer, warned the Motorola dealer that his importation of American-made television sets and FM radios probably infringed pool patents. The dealer not only was cautioned that CRPL remained willing to litigate infringements, describing two recent and successful suits, but also was reminded of CRPL's policy against licensing imports:

> "In closing, I wish to inform you that we would be most happy to issue a license to you to make or have made in Canada any equipment coming within the ambit of our patents."

nadian performance to the discouraging and repressive effects of the pool. The Court of Appeals did not refuse to credit this testimony, as HRI insists we should do,[18] but accepting it as some evidence of damage, considered it of insufficient weight to prove injury to Zenith's business. In this respect the Court of Appeals both gave insufficient deference to the findings of the trial judge and failed to adhere to the teachings of *Bigelow* v. *RKO Radio Pictures, Inc.*, 327 U. S. 251 (1945), and other cases dealing with the standard of proof in treble-damage actions.

In applying the clearly erroneous standard to the findings of a district court sitting without a jury, appellate courts must constantly have in mind that their function is not to decide factual issues *de novo*. The authority of an appellate court, when reviewing the findings of a judge as well as those of a jury, is circumscribed by the deference it must give to decisions of the trier of the fact, who is usually in a superior position to appraise and weigh the

18. HRI urges that the trial testimony as to Canada of each of two Zenith officers, Wright and Kaplan, was inconsistent with his own testimony on recall, inconsistent with the testimony of the other, and inconsistent with documentary evidence, and that we should therefore disregard their testimony. It is true that the trial judge's views as to credibility are not completely impervious, but Rule 52(a) admonishes due regard for the trial court's opportunity to assess the credibility of witnesses. The Court of Appeals clearly took into account this evidence, and we see no adequate basis in the record for refusing to accept the testimony of the two Zenith officers as probative evidence. See *United States* v. *United Shoe Machinery Co.*, 247 U. S. 32, 37-38 (1918); *Walling* v. *General Industries Co.*, 330 U. S. 545, 550 (1947); *Graver Tank & Mfg. Co.* v. *Linde Air Products Co.*, 339 U. S. 605, 609-612 (1950); *United States* v. *Oregon State Medical Society*, 343 U. S. 326, 332 (1952); *Orvis* v. *Higgins*, 180 F. 2d 537, 539-540 (C. A. 2d Cir.), cert. denied, 340 U. S. 810 (1950); *Ruth* v. *Utah Construction & Mining Co.*, 344 F. 2d 952 (C. A. 10th Cir. 1965). HRI relies heavily in this respect on Zenith's annual reports for the years 1957-1962, but aside from the fact that these reports, except for 1962, were never admitted into evidence, we find them quite insufficient to undermine the credibility of Wright and Kaplan.

evidence. The question for the appellate court under Rule 52(a) is not whether it would have made the findings the trial court did, but whether "on the entire evidence [it] is left with the definite and firm conviction that a mistake has been committed." *United States* v. *United States Gypsum Co.*, 333 U. S. 364, 395 (1948). See also *United States* v. *National Assn. of Real Estate Boards*, 339 U. S. 485, 495-496 (1950); *Commissioner* v. *Duberstein*, 363 U. S. 278, 289-291 (1960).

Trial and appellate courts alike must also observe the practical limits of the burden of proof which may be demanded of a treble-damage plaintiff who seeks recovery for injuries from a partial or total exclusion from a market; damage issues in these cases are rarely susceptible to the kind of concrete, detailed proof of injury which is available in other contexts. The Court has repeatedly held that in the absence of more precise proof, the factfinder may "conclude as a matter of just and reasonable inference from the proof of defendants' wrongful acts and their tendency to injure plaintiffs' business, and from the evidence of the decline in prices, profits and values, not shown to be attributable to other causes, that defendants' wrongful acts had caused damage to the plaintiffs." *Bigelow* v. *RKO Pictures, Inc., supra*, 327 U. S., at 264. See also *Eastman Kodak Co.* v. *Southern Photo Materials Co.*, 273 U. S. 359, 377-379 (1927); *Story Parchment Co.* v. *Paterson Parchment Paper Co.*, 282 U. S. 555, 561-566 (1931).

In *Bigelow*, a treble-damage plaintiff claimed injury from a conspiracy among film distributors to deny him first-run pictures. He offered evidence comparing his profits with those of a competing theater granted first-run showings and also measuring his current profits against those earned when first-run films had been available to him. This Court, reversing the Court of Appeals,

found the evidence sufficient to sustain an award of damages. Although the factfinder is not entitled to base a judgment on speculation or guesswork,

> "the jury may make a just and reasonable estimate of the damage based on relevant data, and render its verdict accordingly. In such circumstances, 'juries are allowed to act upon probable and inferential, as well as direct and positive proof.' *Story Parchment Co.* v. *Paterson Co., supra,* 561-564; *Eastman Kodak Co.* v. *Southern Photo Co., supra,* 377-379. Any other rule would enable the wrongdoer to profit by his wrongdoing at the expense of his victim. It would be an inducement to make wrongdoing so effective and complete in every case as to preclude any recovery, by rendering the measure of damages uncertain. Failure to apply it would mean that the more grievous the wrong done, the less likelihood there would be of a recovery." 327 U. S., at 264-265.

Here, Zenith was denied a valuable license and submitted testimony that without the license it had encountered distribution difficulties which prevented its securing a share of the market comparable to that which it enjoyed in the United States, and which its business proficiency, demonstrated in the United States, dictated it should have obtained in Canada. CRPL was an established organization with a long history of successfully excluding imported merchandise; and in view of its continued existence during the damage period, the injury alleged by Zenith was precisely the type of loss that the claimed violations of the antitrust laws would be likely to cause. The trial court was entitled to infer from this circumstantial evidence that the necessary causal relation between the pool's conduct and the claimed damage existed. See *Continental Ore Co.* v. *Union Carbide & Carbon Corp.*, 370 U. S. 690, 696-701 (1962).

2. *TheEnglish Pool.*

Hazeltine patents were made available to the English pool in 1930. The pool issued only package licenses, restricted to local manufacture. Although pool radio patents had expired prior to the beginning of the damage period, the trial court found, and we assume, that the pool held television patents which would not be licensed for television sets made in the United States.[19] Zenith was interested in the English market and made exclusive arrangements with one distributor desiring to handle its merchandise. At no time during or before the damage period, however, did Zenith make available or offer for sale a substantial number of television sets suitable for the English market or make any other serious efforts to enter that market. It attained no appreciable position in the English television market.

Having initially found the patent pool responsible over the years for Zenith's failure to participate in the English market, the trial court, after further proceedings, held that a government embargo, not the patent pool, was the sole reason for Zenith's not entering the English market prior to the beginning of the damage period in 1959; until then, the District Court found, the pool "was not called upon to exercise the type of conduct that they exercised in Canada." It did not, however, retreat from its conclusion that restraints imposed by the pool had

19. Wright testified that in mid-1955, a representative of the English pool had confirmed his understanding that "the policy of the pool . . . required that [radio and television] sets be made in England, and that nothing would be licensed if it was imported from abroad." Wright further testified that the pool representative "saw no possibility" that this restrictive policy would be changed in the future. Subsequently, during its dealings with its English radio distributor, Zenith was "given to understand that the television was just out of the question."

foreclosed Zenith during the damage period.[20] In this respect we agree with the Court of Appeals that the trial court clearly erred. Based on our own examination of the record, we are convinced that even with the ending of the embargo in mid-1959, Zenith faced other obstacles which effectively discouraged its entry into the English market and for which the pool was not responsible.

Positing that Zenith could not get a license from the English pool and that it did not enter the British market before or during the damage period, the issue is whether, once the embargo was lifted, Zenith wanted and intended to enter, had the capacity to do so, and was prevented from entering by its inability to secure a patent license and by other operations of the English patent pool. Section 4 of the Clayton Act required that Zenith show an "injury to its business or property by reason of anything forbidden in the antitrust laws." If Zenith's failure to enter the English market was attributable to its lack of desire, its limited production capabilities, or to other factors independent of HRI's unlawful conduct, Zenith would not have met its burden under § 4.[21]

Zenith was interested in the English market; this much is clear. But its standard domestic television set was manufactured to operate on 525 and 625-line-per-second scanning signals, whereas the 405-line signal was

20. Because the embargo precluded any recovery by Zenith for the first year of the damage period, the trial court modified its initial measure of damages to reflect the time it would have taken Zenith, starting with the removal of the embargo, to build up its market share. See n. 1, *supra*.

21. See *American Banana Co.* v. *United Fruit Co.*, 166 F. 261, 264 (C. A. 2d Cir. 1908), affirmed without specific reference to this issue, 213 U. S. 347 (1909); *Stearns* v. *Tinker & Rasor*, 252 F. 2d 589, 606 (C. A. 9th Cir. 1958); *Volasco Products Co.* v. *Lloyd A. Fry Roofing Co.*, 308 F. 2d 383, 395-396 (C. A. 6th Cir. 1962), cert. denied, 372 U. S. 907 (1963). Compare *Pennsylvania Sugar Rfg. Co.* v. *American Sugar Rfg. Co.*, 166 F. 254, 260 (C. A. 2d Cir. 1908).

standard in England until after the damage period. Similarly, while FM transmission was utilized in the United States for the audio portion, AM signals were used in England. Zenith's regular product thus was not salable in the English market. To succeed at all, Zenith had either to produce a differently equipped set or provide for the mass conversion of its standard receivers. Unquestionably, the company had the facilities and the ability to follow either course. But it is equally clear that it pursued neither.[22] A change in the standard British broadcast to include a 625-line signal was under consideration, even imminent, during the damage period. Zenith's merchandise would in any event have sold at prices substantially higher than those prevailing in the English market; tariffs and freight costs tended to widen the differential. Producing a new set for the English market, or modifying existent models on a large-scale basis, would have involved substantial costs.

Based on the evidence before us, including the correspondence between Zenith and its British representative, we think the Court of Appeals correctly rejected the inference that "Zenith intended to and was prepared to enter the English television market during the damage period," and correctly concluded that Zenith was in fact

22. During trial, Wright and Kaplan testified that adjustments could be made by Zenith's English distributor in his shop to adapt Zenith television sets to the English transmission system. However, the fair import of their testimony, both during trial and in November 1965 on recall, was that conversion of Zenith sets to the English system, whether done before shipment to England or in the distributor's shop, had in fact been carried out only occasionally in the past and was of questionable utility on a commercial basis. Wright and Kaplan stated that Zenith could have manufactured a television set suitable for English use without appreciably more difficulty than Zenith faced in producing a new model for the American market, but the record does not indicate that Zenith took any steps in this direction before the end of the damage period, except in anticipation of the British changeover to the 625 line-per-second transmission system.

"waiting for a change in English standards to a 625-line system." 388 F. 2d, at 37. It clearly emerges from the evidence that Zenith had every intention to promote the sale of its television sets if and when the signal change occurred. Given that event, neither the absence of a pool license nor pool threats against it or its customers would have deterred Zenith from a major effort to penetrate the British market. Why the existence of the pool, which as far as the record shows was quiescent during the damage period, should be credited with the power to discourage Zenith's entry before the signal change but not after is difficult to grasp. But the question at hand is not whether, if Zenith had decided to enter the market, the pool would have been a deterrent and inflicted damage. Rather, it is whether Zenith was in fact constrained by the pool to stay out of England during the damage period or whether Zenith's own business calculus led it to await more favorable conditions. As we have said, the latter is the only permissible inference from this record.

3. *The Australian Pool.*

The Australian patent pool, which had exclusive rights to license Hazeltine patents, also granted licenses only for local manufacture. Had HRI and Hazeltine's conspiracy with the Australian pool effectively kept Zenith from that market, a compensable violation of the antitrust laws unquestionably would have occurred. But the findings of the District Court are wholly silent as to how the Australian pool had any impact on Zenith's business. An officer of Zenith revealed that Zenith had exported no products to Australia since the 1920's or early 1930's. Zenith had not requested a pool license during the 20-year period preceding the trial. A government embargo was found by the District Court

to have foreclosed Zenith's American-made merchandise until well into the damage period. High tariffs and shipping costs were additional barriers, as well as the prospect of vigorous competition. Nothing in the record before us would permit the inference that Zenith either intended or was prepared to enter the Australian market during the damage period. The Court of Appeals was correct in reversing the District Court's award of damages with respect to the Australian market.

B. *The Injunction.*

In setting aside the District Court's grant of injunctive relief against continued participation by HRI and Hazeltine in any patent pool or similar association restricting Zenith's export trade,[23] the Court of Appeals stated, without more:

> "It follows from our conclusion with respect to the foreign patent pools that injunctive relief against 'threatened loss or damage' directed at those pools, alleged by Zenith to be unlawful conspiracies, cannot be justified under 15 U. S. C. § 26. Paragraph C of the injunction granted must be stricken." 388 F. 2d, at 39.

The evident premise for striking Paragraph C was that Zenith's failure to prove the fact of injury barred injunctive relief as well as treble damages. This was unsound, for § 16 of the Clayton Act, 15 U. S. C. § 26, which was

23. Paragraph C of the District Court's injunction prohibits HRI from

> "Entering into, adhering to, enforcing or claiming any rights under any contract, agreement, understanding, plan or program, with any other person, company, patent pool, organization, association, corporation or entity which directly or indirectly restricts or prevents defendant-counterclaimant, Zenith Radio Corporation, or any of its subsidiaries, from exporting any electronic apparatus from the United States into any foreign market."

enacted by the Congress to make available equitable remedies previously denied private parties, invokes traditional principles of equity and authorizes injunctive relief upon the demonstration of "threatened" injury.[24] That remedy is characteristically available even though the plaintiff has not yet suffered actual injury, see *Bedford Cut Stone Co.* v. *Journeymen, Stone Cutters' Assn.*, 274 U. S. 37, 54-55 (1927); he need only demonstrate a significant threat of injury from an impending violation of the antitrust laws or from a contemporary violation likely to continue or recur. See *Swift & Co.* v. *United States*, 196 U. S. 375, 396 (1905); *Bedford Cut Stone Co.* v. *Journeymen Stone Cutters' Assn., supra*, at 54; *United States* v. *Oregon State Medical Society*, 343 U. S. 326, 333 (1952); *United States* v. *W. T. Grant Co.*, 345 U. S. 629, 633 (1953).

Moreover, the purpose of giving private parties treble damage and injunctive remedies was not merely to provide private relief, but was to serve as well the high purpose of enforcing the antitrust laws. *E. g., United States* v. *Borden Co.*, 347 U. S. 514, 518 (1954). Section 16 should be construed and applied with this purpose in mind, and with the knowledge that the remedy it affords, like other equitable remedies, is flexible and capable of nice "adjustment and reconcilation between the public interest and private needs, as well as between competing private claims." *Hecht Co.* v. *Boles*, 321 U. S. 321, 329-330 (1944). Its availability should be "conditioned by the necessities

24. Section 16 provides:

"Any person, firm, corporation or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, *against threatened loss or damage by a violation of the antitrust laws*, . . . when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings . . . ." (Emphasis added.)

of the public interest which Congress has sought to protect." *Ibid.*

Judged by the proper standard, the record before us warranted the injunction with respect to Canada. The findings of the District Court were that HRI and CRPL were conspiring to exclude Zenith and others from the Canadian market; there was nothing indicating that this clear violation of the antitrust laws had terminated or that the threat to Zenith inherent in the conduct would cease in the foreseeable future. Neither the relative quiescence of the pool during the litigation nor claims that objectionable conduct would cease with the judgment negated the threat to Zenith's foreign trade.[25] That threat was too clear for argument, and injunctive relief against HRI with respect to the Canadian market was wholly proper.

We also reinstate the injunction entered by the District Court insofar as it more broadly barred HRI from conspiring with others to restrict or prevent Zenith from entering any other foreign market. In exercising its equitable jurisdiction, "[a] federal court has broad power to restrain acts which are of the same type or class as un-

25. HRI informs us that Hazeltine, having obtained an early termination of its licensing agreement with CRPL, is now prepared to license any one or more of its Canadian patents "with no restriction on imports." Since Hazeltine's abandonment of its participation in the Canadian pool occurred only after—and, apparently, in response to—the District Court's judgment and decree, we cannot agree with the suggestion that injunctive relief as to Canada has been rendered unnecessary and inappropriate. See *United States* v. *Oregon State Medical Society*, 343 U. S. 326, 333 (1952); *United States* v. *Concentrated Phosphate Export Assn.*, 393 U. S. 199, 202-203 (1968). Although HRI is free to attempt to demonstrate in the future that the need for injunctive relief with respect to Canada has now been eliminated, or that a change of circumstances elsewhere justifies additional modifications of the injunction, see, *e. g.*, *United States* v. *W. T. Grant Co.*, 346 U. S. 629, 633-636 (1953), we are not willing at this time to undertake a reappraisal of the injunction in light of post-trial developments.

lawful acts which the court has found to have been committed or whose commission in the future, unless enjoined, may fairly be anticipated from the defendant's conduct in the past." *NLRB* v. *Express Publishing Co.*, 312 U. S. 426, 435 (1941). See also *United States* v. *National Lead Co.*, 332 U. S. 319, 328-335 and n. 4 (1947). Given the findings that HRI was conspiring with the Canadian pool, its purpose to exclude Zenith from Canada and its violation of the Sherman Act were clearly established. Its propensity for arrangements of this sort was also indicated by the findings revealing its participation in similar pools operating in England and Australia.[26] Zenith, a company interested in expanding its foreign commerce and having suffered at the hands of HRI and its coconspirators in the Canadian market, was entitled to injunctive relief against like conduct by HRI in other world markets. We see no reason that the federal courts, in exercising the traditional equitable powers extended to them by §16, should not respond to the "salutary principle that when one has been found to have committed acts in violation of a law he may be restrained from committing other related unlawful acts." *NLRB* v. *Express Publishing Co.*, *supra*, at 436. Although a district court may not enjoin all future illegal conduct of the defendant, or even all future violations of the antitrust laws, however unrelated to the violation found by the court, *e. g.*, *New York, N. H. & H. RR.* v. *I. C. C.*, 200 U. S. 361, 401 (1906), "[w]hen the purpose to restrain trade appears from a clear viola-

26. Having not disturbed the District Court's findings that HRI and Hazeltine were conspiring with English and Australian patent pools which refused to license imports, the Court of Appeals in any event should have sustained the injunction with respect to the English and Australian markets. These findings, together with Zenith's demonstrated intent to expand its export business, were sufficient foundation for the conclusion that continued participation by HRI and Hazeltine in the English and Australian pools posed a significant threat of loss or damage to Zenith's business.

tion of law, it is not necessary that all of the untraveled roads to that end be left open and that only the worn one be closed." *International Salt Co.* v. *United States*, 332 U. S. 392, 400 (1947). This is particularly true in treble-damage cases, which are brought for private ends, but which also serve the public interest in that "they effectively pry open to competition a market that has been closed by defendants' illegal restraints." *Id.*, at 401.

III. The Patent Misuse Issue.

Since the District Court's treble damage award for patent misuse was affirmed by the Court of Appeals, and HRI has not challenged that award in this Court, the only misuse issue we need consider at length is whether the Court of Appeals was correct in striking the last clause from Paragraph A of the injunction,[27] which enjoined HRI from

> "A. Conditioning directly or indirectly the grant of a license to defendant-counterclaimant, Zenith Radio Corporation, or any of its subsidiaries, under any other patent *or upon the paying of royalties on the manufacture, use or sale of apparatus not covered by such patent.*" (Emphasis added.)

27. The District Court's injunction also included a paragraph barring HRI from continuing to coerce acceptance of its package license through the mechanism of offering a much lower royalty rate for those licensees who take a license on the entire package of patents rather than a license on merely a few of them. Paragraph B enjoined HRI from

> "Conditioning directly or indirectly the grant of any license to defendant-counterclaimant, Zenith Radio Corporation, or any of its subsidiaries, under any domestic patent upon the payment of the same or greater royalty rate than the rate at which licenses have been granted or offered to others under a group of domestic patents which includes said patent."

The Court of Appeals modified this paragraph in certain respects, 388 F. 2d, at 39, but we do not disturb these modifications.

This paragraph of the injunction was directed at HRI's policy of insisting upon acceptance of its standad five-year package license agreement, covering the 500-odd patents within its domestic licensing portfolio and reserving royalties on the licensee's total radio and television sales, irrespective of whether the licensed patents were actually used in the products manufactured.[28]

In striking the last clause of Paragraph A the Court of Appeals, in effect, made two determinations. First, under its view of *Automatic Radio Mfg. Co.* v. *Hazeltine Research, Inc.*, 339 U. S. 827 (1950), conditioning the grant of a patent license upon payment of royalties on unpatented products was not misuse of the patent. Second, since such conduct did not constitute patent misuse, neither could it be violative of the antitrust laws within the meaning of § 16 of the Clayton Act, under which Zenith had sought and the District Court had granted the injunction. With respect to the first determination, we reverse the Court of Appeals. We hold that conditioning the grant of a patent license upon payment of royalties on products which do not use the teaching of the patent does amount to patent misuse.

The trial court's injunction does not purport to prevent the parties from serving their mutual convenience by basing royalties on the sale of all radios and television sets, irrespective of the use of HRI's inventions. The injunction reaches only situations where the patentee directly or indirectly "conditions" his license upon the payment of royal-

28. The District Court concluded:

"Plaintiff's demands that royalties be paid on admittedly unpatented apparatus constitute misuse of its patent rights and plaintiff cannot justify such use of the monopolies of its patents, by arguing the necessities and convenience to it of such a policy. While parties in an arms-length transaction are free to select any royalty base that may suit their mutual convenience, a patentee has no right to demand or force the payment of royalties on unpatented products." 239 F. Supp., at 77.

ties on unpatented products—that is, where the patentee refuses to license on any other basis and leaves the licensee with the choice between a license so providing and no license at all. Also, the injunction takes effect only if the license is conditioned upon the payment of royalties "on" merchandise not covered by the patent—where the express provisions of the license or their necessary effect is to employ the patent monopoly to collect royalties not for the use of the licensed invention, but for using, making, or selling an article not within the reach of the patent.

A patentee has the exclusive right to manufacture, use, and sell his invention. See, *e.g.*, *Bement* v. *National Harrow Co.*, 186 U. S. 70, 88-89 (1902). The heart of his legal monopoly is the right to invoke the State's power to prevent others from utilizing his discovery without his consent. See, *e.g.*, *Continental Paper Bag Co.* v. *Eastern Paper Bag Co.*, 210 U. S. 405 (1908); *Crown Die & Tool Co.* v. *Nye Tool & Machine Works*, 261 U. S. 24 (1923). The law also recognizes that he may assign to another his patent, in whole or in part, and may license others to practice his invention. See, *e.g.*, *Waterman* v. *Mackenzie*, 138 U. S. 252, 255 (1891). But there are established limits which the patentee must not exceed in employing the leverage of his patent to control or limit the operations of the licensee. Among other restrictions upon him, he may not condition the right to use his patent on the licensee's agreement to purchase, use, or sell, or not to purchase, use, or sell, another article of commerce not within the scope of his patent monopoly. *E.g.*, *Ethyl Gasoline Corp.* v. *United States*, 309 U. S. 436, 455-459 (1940); *International Salt Co.* v. *United States*, 332 U. S. 392, 395-396 (1947). His right to set the price for a license does not extend so far, whatever privilege he has "to exact royalties as high as he can negotiate." *Brulotte* v. *Thys Co.*, 379 U. S. 29, 33 (1964). And just as the patent's leverage may not be used to extract from the licensee

a commitment to purchase, use, or sell other products according to the desires of the patentee, neither can that leverage be used to garner as royalties a percentage share of the licensee's receipts from sales of other products; in either case, the patentee seeks to extend the monopoly of his patent to derive a benefit not attributable to use of the patent's teachings.

In *Brulotte* v. *Thys Co., supra*, the patentee licensed the use of a patented machine, the license providing for the payment of a royalty for using the invention after, as well as before, the expiration date of the patent. Recognizing that the patentee could lawfully charge a royalty for practicing a patented invention prior to its expiration date and that the payment of this royalty could be postponed beyond that time, we noted that the post-expiration royalties were not for prior use but for current use, and were nothing less than an effort by the patentee to extend the term of his monopoly beyond that granted by law. *Brulotte* thus articulated in a particularized context the principle that a patentee may not use the power of his patent to levy a charge for making, using, or selling products not within the reach of the monopoly granted by the Government.

Automatic Radio is not to the contrary; it is not authority for the proposition that patentees have *carte blanche* authority to condition the grant of patent licenses upon the payment of royalties on unpatented articles. In that case, Automatic Radio acquired the privilege of using all present and future HRI patents by promising to pay a percentage royalty based on the selling price of its radio receivers, with a minimum royalty of $10,000 per year. HRI sued for the minimum royalty and other sums. Automatic Radio asserted patent misuse in that the agreement extracted royalties whether or not any of the patents were in any way used in Automatic Radio receivers. The District Court and the Court of Appeals approved the agreement as

a convenient method designed by the parties to avoid determining whether each radio receiver embodied an HRI patent. The percentage royalty was deemed an acceptable alternative to a lump sum payment for the privilege to use the patents. This Court affirmed.

Finding the tie-in cases such as *International Salt Co.* v. *United States*, 332 U. S. 392 (1947), inapposite, and distinguishing *United States* v. *United States Gypsum Co.*, 333 U. S. 364 (1948), as involving a conspiracy between patentee and licensees to eliminate competition, the Court considered reasonable "the payment of royalties according to an agreed percentage of the licensee's sales," since "[s]ound business judgment could indicate that such payment represents the most convenient method of fixing the business value of the privileges granted by the licensing agreement." 339 U. S., at 834. It found nothing "inherent" in such a royalty provision which would extend the patent monopoly. Finally, the holding by the Court was stated to be that in licensing the use of patents "it is not *per se* a misuse of patents to measure the consideration by a percentage of the licensee's sales."

Nothing in the foregoing is inconsistent with the District Court's injunction against conditioning a license upon the payment of royalties on unpatented products or with the principle that patent leverage may not be employed to collect royalties for producing merchandise not employing the patented invention. The Court's opinion in *Automatic Radio* did not deal with the license negotiations which spawned the royalty formula at issue and did not indicate that HRI used its patent leverage to coerce a promise to pay royalties on radios not practicing the learning of the patent. No such inference follows from a mere license provision measuring royalties by the licensee's total sales even if, as things work out, only some or none of the merchandise employs the patented

idea or process, or even if it was foreseeable that some undetermined portion would not contain the invention. It could easily be, as the Court indicated in *Automatic Radio*, that the licensee as well as the patentee would find it more convenient and efficient from several standpoints to base royalties on total sales than to face the burden of figuring royalties based on actual use.[29] If convenience of the parties rather than patent power dictates the total-sales royalty provision, there are no misuse of the patents and no forbidden conditions attached to the license.

The Court also said in *Automatic Radio* that if the licensee bargains for the privilege of using the patent in all of his products and agrees to a lump sum or a percentage-of-total-sales royalty, he cannot escape payment on this basis by demonstrating that he is no longer using the invention disclosed by the patent. We neither disagree nor think such transactions are barred by the trial court's injunction. If the licensee negotiates for "the privilege to use any or all of the patents and developments as [he] desire[s] to use them," 339 U. S., at 834, he cannot complain that he must pay royalties if he chooses to use none of them. He could not then charge that the patentee had refused to license except on the basis of a total-sales royalty.

But we do not read *Automatic Radio* to authorize the patentee to use the power of his patent to insist on a total-sales royalty and to override protestations of the licensee that some of his products are unsuited to the patent or that for some lines of his mechandise he has no need or desire to purchase the privileges of the patent. In such event, not only would royalties be collected on

29. The record and oral argument in *Automatic Radio* disclose no basis for the conclusion that Automatic Radio was forced into accepting the total-sales royalty rate by HRI's use of its patent leverage.

unpatented merchandise, but the obligation to pay for non-use would clearly have its source in the leverage of the patent.

We also think patent misuse inheres in a patentee's insistence on a percentage-of-sales royalty, regardless of use, and his rejection of licensee proposals to pay only for actual use. Unquestionably, a licensee must pay if he uses the patent. Equally, however, he may insist upon paying only for use, and not on the basis of total sales, including products in which he may use a competing patent or in which no patented ideas are used at all. There is nothing in the right granted the patentee to keep others from using, selling, or manufacturing his invention which empowers him to insist on payment not only for use but for producing products which do not employ his discoveries at all.

Of course, a licensee cannot expect to obtain a license, giving him the privilege of use and insurance against infringement suits, without at least footing the patentee's expenses in dealing with him. He cannot insist upon paying on use alone and perhaps, as things turn out, pay absolutely nothing because he finds he can produce without using the patent. If the risks of infringement are real and he would avoid them, he must anticipate some minimum charge for the license—enough to insure the patentee against loss in negotiating and administering his monopoly, even if in fact the patent is not used at all. But we discern no basis in the statutory monopoly granted the patentee for his using that monopoly to coerce an agreement to pay a percentage royalty on merchandise not employing the discovery which the claims of the patent define.

Although we have concluded that *Automatic Radio* does not foreclose the injunction entered by the District Court, it does not follow that the injunction was other-

wise proper. Whether the trial court correctly determined that HRI was conditioning the grant of patent licenses upon the payment of royalties on unpatented products has not yet been determined by the Court of Appeals. And if there was such patent misuse, it does not necessarily follow that the misuse embodies the ingredients of a violation of either § 1 or § 2 of the Sherman Act, or that Zenith was threatened by a violation so as to entitle it to an injunction under § 16 of the Clayton Act. See, *e. g. Morton Salt Co.* v. *G. S. Suppiger Co.*, 314 U. S. 488, 490 (1942); *Transparent-Wrap Machine Corp.* v. *Stokes & Smith Co.*, 329 U. S. 637, 641 (1947); *Laitram Corp.* v. *King Crab, Inc.*, 245 F. Supp. 1019 (D. C. D. Alaska 1965). See also Report of the Attorney General's National Committee to Study the Antitrust Laws, at 254 (1955); Nordhaus & Jurow, Patent-Antitrust Law 122-123 (1961); Frost, Patent Misuse As A Per Se Antitrust Violation, in Conference on the Antitrust Laws and the Attorney General's Committee Report 113-123 (Ed. Rahl & Zaidins 1955). Compare Staff of Antitrust Subcomm. of House Comm. on the Judiciary, 84th Cong., 2d Sess., Antitrust Problems in the Exploitation of Patents 23 (Comm. Print. 1956); Schueller, The New Antitrust Illegality Per Se: Forestalling and Patent Misuse, 50 Col. L. Rev. 170, 184-200 (1950). Whether the findings and the evidence are sufficient to make out an actual or threatened violation of the antitrust laws so as to justify the injunction issued by the District Court has not been considered by the Court of Appeals, and we leave the matter to be dealt with by that court in the first instance.

Accordingly, the judgment of the Court of Appeals is affirmed in part and reversed in part, and the case is remanded to that court for further proceedings consistent with this opinion.

It is so ordered.

SUPREME COURT OF THE UNITED STATES

No. 49.—OCTOBER TERM, 1968.

ZENITH RADIO CORPORATION, *Petitioner*, *vs.* HAZELTINE RESEARCH, INC., et al. } On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

[May 19, 1969.]

MR. JUSTICE HARLAN, concurring in part and dissenting in part.

I concur in Parts I and II of the Court's opinion. However, I do not join Part III, in which the Court holds that a patent license provision which measures royalties by a percentage of the licensee's total sales is lawful if included for the "convenience" of both parties but unlawful if "insisted upon" by the patentee.

My first difficulty with this part of the opinion is that its test for validity of such royalty provisions is likely to prove exceedingly difficult to apply and consequently is apt to engender uncertainty in this area of business dealing, where certainty in the law is particularly desirable. In practice, it often will be very hard to tell whether a license provision was included at the instance of both parties or only at the will of the licensor. District courts will have the unenviable task of deciding whether the course of negotiations establishes "insistence" upon the suspect provision. Because of the uncertainty inherent in such determinations, parties to existing and future licenses will have little assurance that their agree-

ments will be enforced. And it may be predicted that after today's decision the licensor will be careful to embellish the negotiations with an alternative proposal, making the court's unravelling of the situation that much more difficult.

Such considerations lead me to the view that any rule which causes the validity of percentage-of-sales royalty provisions to depend upon subsequent judicial examination of the parties' negotiations will disserve rather than further the interests of all concerned. Hence, I think that the Court has fallen short in failing to address itself to the question whether employment of such royalty provisions should invariably amount to patent misuse.[1]

My second difficulty with this part of the Court's opinion is that in reality it overrules an aspect of a prior decision in this Court, *Automatic Radio Co.* v. *Hazeltine Research, Inc.*, 339 U. S. 827 (1950), without offering more than a shadow of a reason in law or economics for departing from that earlier ruling. Despite the Court's efforts to distinguish *Automatic Radio*, it cannot be denied that the Court there sustained a Hazeltine patent license of precisely the same tenor as the one involved here, on the ground that "[t]his royalty provision does not create another monopoly; it creates no restraint of competition beyond the legitimate grant of the patent." 339 U. S., at 83.

In finding significance for present purposes in some of the qualifying language in *Automatic Radio*, I believe that the Court today has misconstrued that opinion. A reading of the opinion as a whole satisfies me that the *Automatic Radio* Court did not consider it relevant

1. I find it unnecessary to consider the further question whether inclusion of such a provision should be held to violate the antitrust laws.

whether Hazeltine Research had "insisted" upon inclusion of the disputed provision, and that in emphasizing that the royalty terms had no "inherent" tendency to extend the patent monopoly and were not a *"per se"* misuse of patents, the Court was simply endeavoring to distinguish prior decisions in which patent misuse was found when the patent monopoly had been employed to "create *another* monopoly or restraint of competition." 339 U. S., at 832. (Emphasis added.)[2] Until now no subsequent decision has in any way impaired this aspect of *Automatic Radio*.[3]

Since the Court's decision finds little if any support in the prior case law, one would expect from the Court an exposition of economic reasons for doing away with the *Automatic Radio* doctrine. However, the nearest thing to an economic rationale is the Court's declaration that:

> "just as the patent's leverage may not be used to extract from the licensee a commitment to purchase, use, or sell other products according to the desires of the patentee, neither can that leverage be used to garner as royalties a percentage share of the licensee's receipts from sales of other products; in either case, the patentee seeks to extend the monopoly of his patent to derive a benefit not attributable to use of the patent's teachings." *Ante*, at 33.

The Court then finds in the patentee a heretofore nonexistent right to "insist upon paying only for use and not on the basis of total sales . . . ." *Ante*, at 36.

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2. The *Automatic Radio* Court explicitly distinguished a number of cases of that kind, including *United States* v. *U. S. Gypsum Co.*, 333 U. S. 364 (1948), and *Mercoid Corp.* v. *Mid-Continent Investment Co.*, 320 U. S. 661 (1944). See 339 U. S., at 832-833.

3. *Brulotte* v. *Thys Co.*, 379 U. S. 29 (1964), involved a different question: whether a royalty based solely upon use of the invention could be collected for use occurring after the patent's expiration.

What the Court does not undertake to explain is *how* insistence upon a percentage-of-sales royalty enables a patentee to obtain an economic "benefit not attributable to the use of the patent's teachings," thereby involving himself in patent misuse. For it must be remembered that all the patentee has to license is the right to use his patent. It is solely for that right that a percentage-of-sales royalty is paid, and it is not apparent from the Court's opinion why this method of determining the *amount* of the royalty should be any less permissible than the other alternatives, whether or not it is "insisted" upon by the patentee.

One possible explanation for the Court's result, which seems especially likely in view of the Court's exception for cases where the provision was included for the "convenience" of both parties, is a desire to protect licensees against overreaching. But the Court does not cite, and the parties have not presented, any evidence that licensees as a class need such protection.[4] Moreover, the Court does not explain why a royalty based simply upon use could not be equally overreaching.

Another possible justification for the Court's result might be that a royalty based directly upon use of the patent will tend to spur the licensee to "invent around" the patent or otherwise acquire a substitute which costs less, while a percentage-of-sales royalty can have no such effect because of the licensee's knowledge that he must pay the royalty regardless of actual patent use. No hint of such a rationale appears in the Court's opinion. Moreover, under this theory a percentage-of-sales royalty would be objectionable largely because of resulting damage to the rest of the economy, through less efficient allocation of resources, rather than because of possible

4. Cf. *American Photocopy Equip. Co.* v. *Rovico*, 359 F. 2d 745 (1966).

harm to the licensee. Hence, the theory might not admit of the Court's exception for provisions included for the "convenience" of both parties.

Because of its failure to explain the reasons for the result reached in Part III, the Court's opinion is of little assistance in answering the question which I consider to be the crux of this part of the case: whether percentage-of-sales royalty provisions should be held without exception to constitute patent misuse. A recent economic analysis[5] argues that such provisions may have two undesirable consequences. First, as has already been noted, employment of such provisions may tend to reduce the licensee's incentive to substitute other, cheaper "inputs" for the patented item in producing an unpatented end-product. Failure of the licensee to substitute will, it is said, cause the price of the end-product to be higher and its output lower than would be the case if substitution had occurred.[6] Second, it is suggested that under certain conditions a percentage-of-sales royalty arrangement may enable the patentee to garner for himself elements of profit, above the norm for the industry or economy, which are properly attributable not to the licensee's use of the patent but to other factors which cause the licensee's situation to differ from one of "perfect competition," and that this cannot occur when royalties are based upon use.[7]

If accepted, this economic analysis would indicate that percentage-of-sales royalties should be entirely outlawed. However, so far as I have been able to find, there has as yet been little discussion of these matters either by lawyers or by economists. And I find scant illumination

5. Baxter, Legal Restrictions on Exploitation of the Patent Monopoly: An Economic Analysis, 76 Yale L. J. 267 (1966).

6. See *id.*, at 299-301, 302-306.

7. See *id.*, at 300-301, 302-306, 331-332.

on this score in the briefs and arguments of the parties in this case. The Court has pointed out both today and in *Automatic Radio* that percentage-of-sales royalties may be administratively advantageous for both patentee and licensee. In these circumstances, confronted, as I believe we are, with the choice of holding such royalty provisions either valid or invalid across the board, I would, as an individual member of the Court, adhere for the present to the rule of *Automatic Radio*.

SUPREME COURT OF THE UNITED STATES.

No. 49, October Term, 1968.

ZENITH RADIO CORPORATION,

Petitioner,

v.

HAZELTINE RESEARCH, INC., ET AL.

ON WRIT OF CERTIORARI to the United States Court of Appeals for the Seventh Circuit.

THIS CAUSE came on to be heard on the transcript of the record from the United States Court of Appeals for the Seventh Circuit, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is ordered and adjudged by this Court that the judgment of the said United States Court of Appeals in this cause be, and the same is hereby, affirmed in part and reversed in part, with one half of the total costs to be taxed the respondents therein; and that this cause be, and the same is hereby, remanded to the

United States Court of Appeals for the Seventh Circuit for further proceedings in conformity with the opinion of this Court.

It is further ordered that the said petitioner, Zenith Radio Corporation, recover from the Hazeltine Research, Inc., et al. Twenty-three Thousand One Hundred and Eighty-one Dollars and Twenty-eight Cents ($23,181.28) for their costs herein expended.

May 19, 1969

Clerk's costs	$ 150.00
Printing of record ...	46,212.55
Total	$46,362.55

A true copy

Test:

/s/ JOHN F. DAVIS,

Clerk of the Supreme Court of the United States.

IN THE UNITED STATES COURT OF APPEALS
for the Seventh Circuit.

HAZELTINE RESEARCH, INC., *Appellant,* *vs.* ZENITH RADIO CORPORATION, *Appellee.*	Appeals from the United States District Court for the Northern District of Illinois, Eastern Division. No. 15246 No. 15563

MOTION TO DISQUALIFY JUDGE WALTER J. CUMMINGS, JR. FROM FURTHER PARTICIPATION IN ANY HEARING IN THIS COURT IN THIS CASE.

Now comes Zenith Radio Corporation, Appellee herein, by Thomas C. McConnell, its counsel and asks that Judge Walter J. Cummings, Jr. disqualify himself from any further participation in this case and for cause shows:

(1) That one of the issues sought to be raised by Hazeltine Research, Inc., Appellant, in further hearings in this cause is the effect of a certain release executed with others by Western Electric Co., a subsidiary of American Telephone and Telegraph Company, the appellant claiming that such release acts to release Hazeltine Research, Inc. as a conspirator with the Western Electric Company from liability from acts occurring prior to the execution of such release. That in making this contention, Hazeltine Research, Inc. is compelled to and does allege that it was a co-

conspirator with the Western Electric Company in the conspiracy which the Supreme Court of the United States has now held to be an illegal conspiracy violating Sections 1 and 2 of the Sherman Act.

(2) That at the time the said release was executed, Judge Walter J. Cummings, Jr. was attorney for the Western Electric Company and was actively engaged in defending that company now claimed to be the appellant's co-conspirator and was appearing continuously in court and making arguments in defense of his client's position that the conspiracy was legal under the antitrust laws. That one of the issues sought to be re-asserted here by Hazeltine Research, Inc. is the legality of the selfsame conspiracy held illegal by the Supreme Court.

(3) That the record in this case at p. 2129 of the Appendix, being plaintiff's exhibit No. 43 and as shown by the signature of Judge Cummings on appellee's exhibit No. 43 (A2129) shows that said Judge was then attorney of record for the Western Electric Company and signed the stipulation dismissing the cause of Zenith's counterclaim on behalf of Western Electric and therefore consummated a settlement of the cause for a consideration of some $10,000,000.

(4) That at the time of the said settlement and at the time the counterclaim was dismissed pursuant to the stipulation, the said Walter J. Cummings, Jr. told Thomas C. McConnell, then and now attorney for Zenith Radio Corporation, that he, Cummings, as its lawyer, had advised the Western Electric Company, a subsidiary of the telephone company, not to make a settlement because in his opinion Zenith could not prove its damages. That this is exactly the position which was taken by this Court in the above-entitled cause in the hearing of which Judge Cummings was a member of the panel and which panel held that

Zenith had shown no "fact of damage," that opinion being now reversed by the Supreme Court of the United States.

(5) That the fact that Judge Cummings participated as attorney, actively engaged in the litigation and not a mere attorney of record is shown by the transcripts of the proceedings which were filed as a part of the record in the United States District Court in Cause No. 48 C 1818 and of which Zenith has copies and can produce them for the inspection of this Court if the Court so requests.

(6) That since the same issues raised in that case are being raised here by Hazeltine Research, Inc., a co-conspirator with the Western Electric Company, Zenith may be forced to argue issues before a judge who appeared in an antagonistic position to Zenith and its attorneys and opposed each and every contention made by Zenith in that case which contentions involved the same illegal conspiracy and its effect on Zenith's Canadian business at an earlier period than here involved.

(7) That the reason Judge Cummings was not requested to disqualify himself at the time this case was originally heard was that Zenith's counsel had no knowledge, prior to the actual appearance on the bench of Judge Cummings, that he was going to participate as a judge in the case. That Zenith's counsel was present, prepared to argue the case and had no opportunity of consulting with his client so that he might have authority to make a motion of the kind and character presented here; that in view of the facts here presented Judge Cummings has the legal and ethical duty to recuse himself regardless of whether Zenith or its counsel makes a motion to that effect.

WHEREFORE, in the interests of justice and pursuant to the principles set forth in *Roberson* v. *United States*, 249 F. 2d 737 at p. 741 a situation is presented "under which a judge should have disqualified himself" and therefore

appellee Zenith Radio Corporation requests that Judge Walter J. Cummings, Jr. now disqualify himself from any further participation in this case.

ZENITH RADIO CORPORATION,
Appellee,
By THOMAS C. MCCONNELL,
Its Attorney.

STATE OF ILLINOIS }
COUNTY OF COOK } ss.

Thomas C. McConnell, being duly sworn on oath says that he has read and subscribed to the foregoing motion and that the facts therein stated are true.

THOMAS C. MCCONNELL.

Subscribed and sworn to before me, a Notary Public in and for the State and County aforesaid this 20th day of June, 1969.

STEPHANIE A. CHODERA,
Notary Public.

UNITED STATES COURT OF APPEALS,

For the Seventh Circuit.

Chicago, Illinois 60604.

June 30, 1969

Before

Hon. Latham Castle, Chief Judge
Hon. Roger J. Kiley, Circuit Judge
Hon. Walter J. Cummings, Circuit Judge

HAZELTINE RESEARCH, INC., and HAZELTINE CORPORATION,
Appellants,
Nos. 15246, 15247, 15563, 15564,
vs.
ZENITH RADIO CORPORATION,
Appellee.

} Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.

ORDER.

This cause has come on to be heard upon the motion of Hazeltine Corporation for issuance of this court's mandate vacating the district court judgment against it, pursuant to the Supreme Court affirmance of that part of this court's judgment in the above cause; upon the motion of Hazeltine Research, Inc. for leave to file supplemental briefs and schedule oral argument on the issues remaining undecided in this court, and Zenith Radio Corporation's answer there-

to; upon Zenith's motion to disqualify Judge Cummings from further participation in this case; and upon the motion of Hazeltine Research for extension of time to respond to Zenith's motion and answer.

And this court being fully advised by the motions and answer, IT IS ORDERED that the Hazeltine Corporation motion for issuance of mandate be and it is hereby allowed; that the Hazeltine Research, Inc. motion for scheduling of supplemental briefs and oral arguments be and it is hereby denied; however, both parties, before September 1, 1969, may call to the court's attention any supplemental authorities with respect to the matters still before this court; that the Zenith motion to disqualify Judge Cummings is denied and the motion of Hazeltine Research for an extension of time to respond to that motion is denied; that the motion of Hazeltine Research for extension of time to respond to the answer of Zenith is allowed, to July 15, 1969, with respect only to paragraph 4 of said motion.

IN THE UNITED STATES COURT OF APPEALS,

For the Seventh Circuit.

September Term, 1969 — September Session, 1969

Nos. 15246, 15563

HAZELTINE RESEARCH, INC.,
Plaintiff and Counter-Defendant, Appellant,
vs.
ZENITH RADIO CORPORATION,
Defendant and Counter-Claimant, Appellee.

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.

October 27, 1969

Before CASTLE, *Chief Judge,* KILEY and CUMMINGS, *Circuit Judges.*

KILEY, *Circuit Judge.* This court, on December 19, 1967, filed its decision, 388 F. 2d 25 (7th Cir. 1967), in the above causes and, so far as pertinent now, affirmed the judgment awarding $150,000, treble damages, to Zenith Radio Corporation for misuse by Hazeltine Research, Inc. (HRI) of its domestic patents, but struck paragraph A of the related injunction, issued to restrain HRI from imposing unlawful conditions on those patents. We reversed the judgment in Zenith's favor for $38,000,000, treble damages, based on HRI's unlawful participation in the Canadian, English and Australian patents pools, and *ipso facto* set aside an injunction restraining HRI's further unlawful antitrust activity in these foreign patent pools.

On appeal to the Supreme Court, the treble damage award with respect to the domestic patents was not challenged. The Court, 395 U. S. 100 (1968), reversed our decision striking paragraph A of the injunction and remanded that part to this court for further consideration. *The Court also reversed our decision setting aside the award of damages flowing from the unlawful activity of the Canadian pool and remanded that issue to us to consider the effect of HRI's affirmative release and statute of limitations defenses on the award.* In addition, the Court reinstated the related injunction which this court had set aside with that treble damage judgment for Zenith.[1] The Supreme Court reversed our decision with respect *to the Canadian patent pool because it concluded we erred in our determination that Zenith had failed to prove the "fact" of damage in Canada.*

After the Supreme Court mandate was filed in this court, we gave leave to HRI and Zenith to file supplemental authorities. Zenith thereupon "abandon[ed] its request" originally made in this court to reinstate paragraph A which this court had struck. The following questions are before us: (1) whether Zenith's injury during the statutory damage period resulted to any extent from HRI's conduct preceding that period and, if so, what effect releases given by Zenith in 1957 had on Zenith's recovery; (2) what effect the statute of limitations had on HRI's liability; and (3) whether the award of damages was excessive. *These points had been raised before us by HRI in the first appeal, but we saw no need of passing on them in view of our reversal of the judgment for Zenith.*

We have examined the issues now before us in the light

1. The Supreme Court affirmed this court's decision vacating judgments in Zenith's favor against Hazeltine Corporation. It affirmed our decision with respect to setting aside the treble damage judgment so far as it was based on the patent pool activities in England and Australia.

of the Supreme Court opinion and the supplemental authorities cited to us. We vacate the judgment for Zenith with respect to the Canadian pool in the amount of $6,297,391, trebled, and remand for further proceedings with respect to the award of damages.

THE AFFIRMATIVE DEFENSES.

After the evidence at the trial was closed HRI moved for leave to file the affirmative defenses in bar of Zenith's recovery. *Zenith's counsel objected to the filing of the defenses on the ground that they came too late and were waived.* The district court, however, permitted the defenses to be filed and thereafter denied HRI's motion for judgment based on the defenses. The Supreme Court noted that the district court's refusal to disturb the findings it had already made with respect to the Canadian pool *was a rejection of the defenses either on the merits or on the ground that the defenses had been waived under Fed. R. Civ. P. 12(h). 395 U. S. 100, 117, n. 13. It is our view that the court's ruling was not on the basis of waiver, but because the defenses on their merits did not bar Zenith's recovery.* We turn therefore to consideration of the correctness of the district court's ruling.

The relevant four year damage period was measured from May 22, 1963, when Zenith filed its counterclaim.[2] The cutoff date therefore was May 22, 1959. HRI relies upon releases given September 27, 1957, by Zenith to RCA, General Electric, and Western Electric in settlement of Zenith's counterclaim in the case of *RCA* v. *The Rauland Corp. and Zenith Radio Corp.*, No. 48 C 1818 (N. D. Ill. 1957), in contending that Zenith's claim is now barred.

2. See 395 U. S. 100, 108 (1968). 15 U. S. C. § 15b reads:

> Any action to enforce any cause of action under sections 15 or 15a of this title shall be forever barred unless commenced within four years after the cause of action accrued.

The Supreme Court in noting that the district court did not date the events as occurring before or after the May 22, 1959 start of the damage period, said "[t]he damage award was confined to *injuries* sustained during the damage period, but the trial court apparently deemed it immaterial whether the damage-causing acts occurred before or after the start of the damage period." 395 U. S. 100, 116 (1968). Damages were awarded, the Court said, on the assumption that were it not for the conspiracy, Zenith would have had sixteen per cent of the Canadian market instead of its actual three per cent on May 22, 1959 and throughout the damage period. The Court then stated that since the district court attributed the deficient share on May 22, 1959 to the conduct of the pool, that conduct necessarily preceded the deficiency, and therefore pre-damage period conduct necessarily resulted in some part of the damages awarded.

Since HRI was an unnamed joint tortfeasor, as admitted by Zenith at trial, with its co-conspirators in the Canadian pool who were named in the *Rauland* case, and Zenith did not reserve its right against HRI, the releases given by Zenith clearly barred recovery from HRI of past, present and *future damages* flowing from any misconduct of HRI prior to the dates of the releases. *Twentieth Century-Fox Film Corp.* v. *Winchester Drive-In Theatre,* 351 F. 2d 925, 931 (9th Cir. 1965), *cert, denied,* 382 U. S. 1011 (1966); *Dura Electric Lamp Co.* v. *Westinghouse Electric Corp.,* 249 F. 2d 5 (3r Cir. 1957). Our inquiry there is narrowed to the question of the effect of the statute of limitations on Zenith's right of recovery for post-release misconduct.

It is "well settled . . . that no civil action lies for a conspiracy unless there be an overt act that results in damage to the plaintiff." *Nalle* v. *Oyster,* 230 U. S. 165, 182 (1913). Consequently, in the case before us the mere existence of the conspiracy following the 1957 releases does not itself give rise to Zenith's cause of action. The law with respect

to the statute of limitations in Sec. 15b of the Clayton Act is that the period commences to run from the last overt act of the conspiracy. *Crummer Co.* v. *DuPont*, 223 F. 2d 238, 247-48 (5th Cir.), *cert. denied*, 350 U. S. 848 (1955); *Momand* v. *Universal Film Exchange*, 43 F. Supp. 996, 1007 (D. Mass. 1942), *aff'd* 172 F. 2d 37, 47 (1948); *Steiner* v. *Twentieth Century-Fox Film Corp.*, 232 F. 2d 190, 194 (9th Cir. 1956); *Century Hardware Corp.* v. *Powernail Co.*, 282 F. Supp. 223, 227 (E. D. Wis. 1968). In *Century Hardware*, the district court construed this court's decisions in *Emich Motor Co.* v. *General Motors Corp.*, 229 F. 2d 714 (7th Cir. 1956), and *Baldwin* v. *Loew's, Inc.*, 312 F. 2d 387 (7th Cir. 1963), as stating the law of this Circuit to be in accordance with the foregoing decisions.

In *Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.*, 377 F. 2d 776 (3rd Cir. 1967) (supplemental opinion at 793-95), the following rule was applied:

> [W]here the repeated and measurable invasion of a plaintiff's rights occurs both outside the statutory period and also within it, the fact that some of the injury and change occurred outside the statutory period does not affect the plaintiff's right to recover for the separative invasion of its rights which occurred within the period.

The rule as applied in that case was approved by the Supreme Court on appeal of the *Hanover* case. See 392 U. S. 481, 502 n. 15 (1968). Thus, even though Zenith may have had a cause of action for overt acts of the conspiracy prior to May 22, 1959—the beginning of the damage period —*the fact that it did not then file suit does not preclude its present suit for damages suffered within the damage period as a result of an overt act repetitious of the unlawful pre-period acts occurring in the damage period.*

HRI conceded at trial that the Canadian pools existed into the damage period. The record establishes that on

June 5, 1959, the Canadian pool wrote Zenith claiming that it was infringing pool patents by its distribution of American-made televisions and radios in Canada. This act was substantially similar to overt acts occurring in the pre-damage period. Accordingly, Zenith, claiming the right to recover for damages suffered only in the statutory period, is entitled to recover for the damages it suffered as a result of the June 5 injury.[3]

We conclude therefore that the district court's denial of *the motion to bar Zenith's recovery completely on the ground of the releases and the running of the statute of limitations was not erroneous.*

Excessiveness of the Award.

We think this issue is not now ripe for decision because HRI had no opportunity, after the district court permitted filing of HRI's affirmative defenses, to introduce evidence relevant to the affirmative defenses. We vacate the district court's award of $6,297,371—trebled to $18,892,173—and remand for further proceedings.

The measure of proof is the difference between the percentage share that Zenith actually enjoyed during the damage period and the percentage it would have had as a free competitor. There was testimony for Zenith, relied on by the district court, that in the four year damage period,

3. Zenith argued in its original brief that the statute of limitations was tolled by reason of Sec. 5(b) of the Clayton Act during the pendency of *United States* v. *General Electric, et al.* in the Southern District of New York from November 28, 1958 to November 1, 1963. At the trial Zenith did not raise this point in a reply to HRI's affirmative defense, so that, strictly speaking, the point is not properly before us. However, in any event, the law of this circuit is that the tolling of the limitation protects a plaintiff in a private antitrust suit only with respect to a party defendant in the government suit. *Sun Theatre Corp.* v. *RKO Radio Pictures,* 213 F. 2d 284, 292 (7th Cir. 1954). HRI was not a party defendant in that suit, although named as co-conspirator.

had Zenith been free from the unlawful activity of the Canadian pool which virtually excluded it from the Canadian market, *it would have enjoyed the same proportion of that market as it did in the United States market.* In Canada its principal competitors were counterparts of its principal competitors in the United States. Its promotion and advertising flowed back and forth between the two countries. Distributors in Canada were available, but were frightened off by the pool's activities and threats. *It is our view that this was competent evidence, prima facie, upon which the amount of damage could be reasonably approximated by virtue of the Supreme Court's decision in Bigelow* v. *RKO Radio Pictures,* 327 U. S. 251, 264-65 (1946).

The district court in permitting the filing of HRI's affirmative defenses of release and statute of limitations—as an amendment to HRI's defense to Zenith's counterclaim—*made it plain in doing so that the court would make no change in its findings and* conclusions with respect to *damage in the Canadian market.* However, we refer again to the statement of the Supreme Court that "[s]ome part of the damages awarded . . . *necessarily resulted from pre-damage period conduct.*" 395 U. S. 100, 116-17. The Court noted that although the damage award was confined to the damage period, the trial court apparently deemed it immaterial whether the "damage-causing" acts occurred before or after the start of the damage period.

Earlier in this opinion we held that the releases only barred Zenith's recovery of damages caused by injuries *inflicted prior to the date of the releases; that the damage period commenced to run from the last overt act of the conspiracy; and that the statute of limitations did not bar* recovery of damages *caused by "damage-causing" acts within the period.* Accordingly, we think that HRI should have—what it was not given at the trial—an opportunity to introduce testimony, in support of its defense of statute of

limitations, aimed at excluding from recovery damages flowing from pre-period "damage-causing" acts, as well as *an opportunity to introduce evidence to show that Zenith's damage flowing from "damage-causing" acts within the period did not amount to $6,297,391.*

The judgment for $6,297,391—before trebling—is vacated and the cause is remanded for further proceedings consistent with the views expressed in this opinion. (Italics ours.)

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

Monday, October 27, 1969.

Before
Hon. Latham Castle, Chief Judge.
Hon. Roger J. Kiley, Circuit Judge.
Hon. Walter J. Cummings, Circuit Judge.

No. 15246, 15563
HAZELTINE RESEARCH, INC.,
Plaintiff and Counter-Defendant-Appellant,
vs.
ZENITH RADIO CORPORATION,
Defendant and Counter-Claimant-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, subsequent to the remandment to this Court by the Supreme Court of the United States for further proceedings in conformity with the opinion of said Court.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court for $6,297,391—before trebling—in this cause appealed from be, and the same is hereby, VACATED, and that this cause be, and it is hereby, REMANDED to the said District Court for further proceedings consistent with the views expressed in the opinion of this Court filed this day.

It is further ordered and adjudged that the costs of these appeals in this Court be divided equally between the parties.

IN THE UNITED STATES COURT OF APPEALS,

For the Seventh Circuit.

HAZELTINE RESEARCH, INC.,
Plaintiff and Counter-Defendant, Appellant,
v.
ZENITH RADIO CORPORATION,
Defendant and Counter-Claimant, Appellee.

Nos. 15246 and 15563

STIPULATION CONCERNING RECORD ON ZENITH'S PETITION FOR CERTIORARI.

Counsel for Zenith Radio Corporation and counsel for Hazeltine Research, Inc. agree that the following items in the record of the United States Court of Appeals for the Seventh Circuit in Docket Nos. 15246 and 15563, shall be certified to and filed with the Clerk of the Supreme Court of the United States:

1. The entire record which was certified to and filed in the Supreme Court pursuant to the stipulation of counsel dated March 6, 1968, filed in this Court and printed in Supreme Court appendix pages 4279-83, in No. 1266, October Term, 1967 (specifically excluding the materials excluded under said stipulation).

2. The entire record in said Court of Appeals in Docket Nos. 15246 and 15563, subsequent to the opinion of the Supreme Court of May 19, 1969, including but not by way of limitation, the mandate of the Supreme Court, all mo-

tions, answers, briefs, memoranda, supplemental authorities and other papers filed by Hazeltine Research, Inc. or Zenith Radio Corporation, and all orders of said Court of Appeals and its opinion and judgment of October 27, 1969.

Dated this 23rd day of March, 1970.

/s/ THOMAS C. MCCONNELL,
Thomas C. McConnell,
Attorney for Petitioner Zenith Radio Corporation,
134 South La Salle Street,
Chicago, Illinois 60603,
RAndolph 6-9131.

/s/ VICTOR P. KAYSER,
Attorney for Respondent Hazeltine Research, Inc.,
135 South La Salle Street,
Chicago, Illinois 60603,
RAndolph 6-2545.

IN THE UNITED STATES DISTRICT COURT.
* * (Caption—59-C-1847) * *

TRANSCRIPT OF PROCEEDINGS

had in the above-entitled cause before the Hon. Richard B. Austin, one of the judges of said court, in his courtroom in the United States Courthouse at Chicago, Illinois, on Tuesday, March 30, 1965, at the hour of 2:00 o'clock p.m.

Present:

Mr. Victor P. Kayser, Mr. Hudson Rathburn, and Mr. C. Lee Cook, Jr., on behalf of the plaintiff;

Mr. Thomas C. McConnell, Mr. Philip J. Curtis, and Mr. Francis W. Crotty, on behalf of the defendant.

Of Counsel for Defendant: Mr. Dugald S. McDougall.

[2] The Clerk: 59 C 1847, Hazeltine v. Zenith, hearing.

Mr. Kayser: Hazeltine is ready, your Honor.

The Court: You have the laboring oar.

Are you ready, Mr. McConnell?

Mr. McConnell: We are ready, your Honor.

The Court: You may proceed.

Mr. Kayser: Your Honor, I would first—

The Court: Let me say that there will be no restrictions on anything that anybody wants to say. I mean, you are not restricted to today or tomorrow or the next day, which may make some people in the courtroom happy.

Mr. Kayser: Well, your Honor, at the outset I would like to answer a question which you asked last Friday and, namely, that was whether John Chadwell will be here to argue this.

The Court: I don't see him.

Mr. Kayser: You are quite correct, your Honor, he is not here. But I want to give an explanation, nevertheless.

The Court: I am sure you can get along all right in his absence.

Mr. Kayser: Well, your Honor, if I may, I would [3] like to explain the circumstances.

The Court: All right.

Mr. Kayser: Because he was the lawyer who came before you in February and asked for the time.

The Court: Yes.

Mr. Kayser: And I am the second man on the case, so if I may, I would like to state briefly—

The Court: All right.

Mr. Kayser: When he asked for the time to examine into the case, he assumed that the trial that he was then involved in would end in about three weeks, but as so often is the case, it went on and on and still is going on, and the present forecast is that it will not finish until the middle of April.

Now, the case is not on trial this week. I want to make that clear. They are working with their trial preparation. But even if Mr. Chadwell were here today, and by reason of the fact that although he has been in touch with what we have done here and heartily agrees with it, he could not possibly have been in a position to argue the case. He asked me to express his regrets to the court and to say that if by any chance the court wanted to put it over until May, [4] he would be eager to make the argument, but in the meantime—

The Court: I am not that eager.

Mr. Kayser: Yes, your Honor.

Well, I am here, then, ready to argue in his place and stead, and I guess I will just have to play David to Mr. McConnell's Goliath.

Well, now, to the case and our part in it: When we were retained—

The Court: I assume that you perhaps are going to divide this up between the misuse issue and the antitrust issue.

Mr. Kayser: Yes, your Honor, I will talk about the antitrust counterclaim first and at greatest length and then touch more briefly on our misuse motion.

The Court: As I understand it, there is no contention in regard to the misuse that there was any subterfuge or laying in the weeds and surprising people in court.

Mr. Kayser: That is right, your Honor.

The Court: That applies only to the counterclaim.

Mr. Kayser: On the misuse there is no such contention.

The Court: All right.

[5] Mr. Kayser: Well, now, when we were retained as additional counsel in this case back in February, all we knew was that we suddenly had a client who told us that—

The Court: Who needed a lawyer.

Mr. Kayser:—who needed a lawyer, needed another lawyer. They had filed a patent suit, been greeted with a misuse defense, and some years later were greeted with an antitrust counterclaim which looked to them and to their counsel as being primarily a make-way pleading, and the next thing they knew they were faced with the possibility of a judgment of some over $48,000,000 which was —I believe is probably the largest known at least in antitrust treble damage annals and is some ten to fifteen times their net worth; so I think it is understandable why they were alarmed.

[6] Well, now, when we got the time from this Court to analyze this case, we of course began immediately with a very concerted analysis and study. And one of the things that we analyzed, and analyzed in part, was the Exhibit, Defendant's Exhibit 218, this document on which all of this claim of damages is based.

We checked into enough to realize that there was some

might strange things in that Exhibit. We understood why Mr. Dodds was confused by it, because we couldn't figure it out. So we got Ernst & Ernst in, the accountants, and they made an analysis of Exhibit 218, and that's a later part of my discussion.

But I must say that when you look at that Exhibit 218, a bunch of longhand papers that are not even legible—they weren't even typed to bring into Court—I think this is probably the sorriest group of documents that 48 million dollars has ever been based on.

But now getting back to our part in the case, as we proceeded with our examination, we found some—gradually [7] found some very startling and significant things. As we looked into this thing, it gradually dawned on us, your Honor—

The Court: You are now addressing yourself to the question of damages?

Mr. Kayser: No, your Honor. I say I will go to the question of damages later. I just want to explain that Ernst & Ernst had been drawn into the case because we couldn't figure out that Exhibit.

The Court: All right. I see.

Mr. Kayser: And I am now back to where we did our own work without Ernst & Ernst accounting help. But the thing that came to light gradually was the fact that the cause of action which was embodied in these findings and conclusions wasn't even a cause of action which was in the counter-claim. And the cause of action which was in the findings was a cause of action which, if it had been pleaded, would have called for a great deal more discovery; it would have resulted obviously in the filing of the affirmative defenses or release of joint tortfeasors and the statute of limitations.

The Court: Are you saying now that you couldn't de-

termine from this counter-claim what the plaintiff's [8] counter-claim embraced?

Mr. Kayser: No, that is not true, your Honor. The counter-claim as pleaded we could understand, but we discovered that the evidence did not relate to this counter-claim but to another theory which appears for the first time, actually, in the findings.

The Court: Doesn't the counter-claim relate to the inability to export to these countries American made products?

Mr. Kayser: It relates to that subject, your Honor—

The Court: Isn't that clear in the counter-claim?

Mr. Kayser: No. That is clear, but it is also clear, your Honor, that the cause of action for damages which was pleaded there was the claim that, by reason of the acts of Hazeltine in filing the patent suit, plus the alleged infringement threats—that by reason of those acts, those were the proximate cause by the reason of those acts, Zenith's ability to expand—nothing more; ability to expand in these three countries and, they say, and other countries had been interfered with.

[9] The Court: I mean, is it your theory that they proved up something that wasn't in the pleadings? Is that it?

Mr. Kayser: Yes, your Honor. That is exactly our theory.

As a matter of fact, we have taken occasion to put here on a chart a comparison, a comparison of what is—and this, incidentally, is reproduced from page 26, I believe, of our memorandum, a comparison of what it is that Zenith pleaded.

The Court: And that they proved up something else?

Mr. Kayser: And they proved up something entirely different, yes.

Both of them ask for treble damages.

The Court: There was once a time when one of the great con men of the country appealing his case said that he was indicted for a crime that hadn't occurred, tried for a crime for which he wasn't indicted, and convicted of a crime for which he wasn't tried. I mean, you don't go the three stages; you just go two.

Mr. Kayser: I'm afraid you lose me on the third one, your Honor.

[10] The Court: He was convicted of something for which he was not tried. I mean, you at least embrace that feature. You were found guilty of something for which you didn't think you were being tried.

Mr. Kayser: Or which the findings allege acts and allege facts of which we were not charged, of which we were not apprised in the pleadings.

The Court: I mean, you are right in line with the last one of the three things raised by this gentleman I am talking about.

Mr. Kayser: I'm sorry, your Honor. I don't know that case.

The Court: I know you don't.

Mr. Kayser: Well, this basically is what we found. These are matters, your Honor, which admittedly were not called to your attention, and which were not before your Honor when he entered his findings and conclusions. And it was for that reason that we filed the motion to set aside the antitrust findings which I am here to discuss today.

Now—

The Court: What in your opinion was the issue in regard to the antitrust pleadings?

Mr. Kayser: The issue in the pleading?

[11] The Court: Yes.

Mr. Kayser: The issue in the pleading was whether or not the acts of Hazeltine in bringing this patent suit plus the alleged charges of infringement in connection—

The Court: I mean, the issue in regard to the antitrust aspect. What was the issue that you were charged with, in your opinion?

Mr. Kayser: We were charged with the issue as to whether or not those two acts in fact have interfered with Zenith's ability to expand its foreign trade in these three countries.

Now, your Honor, you may say, well, that doesn't make much sense. The fact is we didn't think and we don't think it makes much sense. But that was what was pleaded.

The Court: Are you the first ones that became aware of that?

Mr. Kayser: Pardon?

The Court: Are you, in your opinion, the first ones that became aware of that?

Mr. Kayser: I believe that's probably a fair statement.

The Court: I mean, you wouldn't say that this was [12] the issue in regard to that. Has Hazeltine Corporation conspired with companies domiciled in Canada, Great Britain, and Australia, but not operating within the United States, with intent and effect of restricting the export of receivers from the United States into their respective countries—that would not be your definition of what the issue was?

Mr. Kayser: No, your Honor. The issue is, as stated in paragraph 9—

The Court: That, of course, was the definition of the issue by Hazeltine's counsel ninety days after all the proof was in.

Mr. Kayser: Sir?

The Court: And I refer you to page 8 of plaintiff's post trial brief.

Mr. Kayser: Yes.

[13] The Court: And that is Hazeltine's counsel's definition of the issue 90 days after the proofs are closed.

Mr. Kayser: You are referring to which—

The Court: Column 2, page 8. And it starts: "There are only two basic issues before the Court for decision." The first one, of course, has to do with the misuse. Number 2 is the one that has to do with the counter-claim.

Mr. Kayser: Yes.

The Court: And he goes on to say that, "If Hazeltine had done these things, prevented the export of television receivers from the United States, this might under appropriate circumstances constitute a violation of the anti-trust laws."

Do you differ with counsel's statement, your prior counsel's statement 90 days after proofs were closed?

Mr. Kayser: As to what the issues were that were presented in this case, yes, your Honor, I do. I most definitely do.

The Court: Of course, you know by now that this is a new theory on your behalf.

[14] Mr. Kayser: Your Honor, I don't think it is a new theory. I think that—

The Court: I mean, at least it wasn't advanced in this brief filed June 8, 90 days after the proofs closed.

Mr. Kayser: Your Honor, we fully recognize the fact that the trial counsel did not realize what was happening to him. We fully realize that fact. If we had realized it—

The Court: I mean, he didn't even realize it 90 days after the proofs were over.

Mr. Kayser: Yes, your Honor. I quite agree.

The Court: How many Hazeltine cases has that trial counsel tried in the Courts of the United States throughout the country, or do you have any knowledge?

Mr. Kayser: He has tried a great many Hazeltine cases, your Honor, but he has not tried any anti-trust cases, and he has not tried any antitrust cases under these—particularly under these circumstances. Yes, he has been involved

in antitrust litigation, but he is a patent man; he is a patent man.

[15] Let me say, if I may, a comment or two on that because I can just anticipate some comments we might otherwise expect from Mr. McConnell here.

The Court: Don't anticipate it to the extent that he doesn't say it.

Mr. Kayser: Well, possibly if I do anticipate, I will save him the trouble.

The Court: I don't believe that will work.

Mr. Kayser: Well, your Honor, I think, is better qualified to answer that than I.

Your Honor, the fact of the matter is this: As concerns Mr. Dodds, he probably has as fine a record in the trial of patent cases as any man of the patent bar today. There isn't any question about it. He is a patent trial lawyer. But Mr. Dodds tries cases normally under particular circumstances involving other patent lawyers who are, you might call them, sort of a gentleman's club. If one of them says to another, "I'm going to rely on this prior art," he knows that is the fact. He doesn't check into it. He knows that that is what it is going to be. If one says to another—the plaintiff to the defendant, that "I propose [16] to charge you with infringement of claim No. 3 in a patent," he knows that is the fact, and he proceeds accordingly, and he gives it no more thought.

[17] The Court: There was some other fine names on this brief of June 8.

Mr. Kayser: Yes; yes.

The Court: And some that are considered knowledgeable in the field that you are talking about.

Mr. Kayser: As a matter of fact, as you know, Mr. Dodds was the man that tried the case.

The Court: I understand. But I don't know whether they are misleading the court by putting these other names

on the brief, and I am referring to page 8 of that brief that has these other names on it.

Mr. Kayser: Your Honor realizes, of course—you were here—who actually tried the case. It was Mr. Dodds.

As I was going to say, Mr. Dodds is not used to being faced with a type of situation where, without as much as a "by your leave," or without request to amend a pleadings, without any notice, he suddenly is faced with an entirely different set of proof.

Now, I suppose your question is, how could this possibly happen.

Well, I think I can explain how it happened.

[18] The Court: I think that the pretrial briefs show that he wasn't suddenly confronted with this, because the pretrial briefs filed many months before trial indicated to Mr. Dodds what the theory of the cross-complainant was.

Mr. Kayser: I fail to see anywhere the theory shown in the right column as being in the findings. I fail to find that in Mr. McConnell's—either in his pretrial brief or in his opening statement. And I would very much like your Honor, if you could, to point out where it is. I would like to see it, because I haven't been able to find it.

The Court: Maybe I might be shutting off Mr. McConnell. I don't want to do that. So if he doesn't, I will supply you with the page numbers in his pretrial brief.

Mr. Kayser: All right.

Well, now, I think I have stated our position as concerns—

The Court: Do you care to point out these differences here?

Mr. Kayser: Yes, your Honor.

As I say, in the counterclaim which was pleaded, we find that the combination of the two acts, the pendency [19] of the infringement—not the filing of it; he admitted that the filing of it gave him no cause of action. The pendency of

it plus the alleged charges of infringement on the hundreds and hundreds of patents which this Hazeltine Corporation had interfered with his ability to expand. He claimed only a period of damage from October 18, '61, to May 22, '63.

Now, he did not do so expressly, but this is necessarily and inescapably involved in his pleading.

The Court: Would you explain that to me.

Mr. Kayser: Yes. Because, to begin with, in the affidavit which Mr. Crotty signed when this counterclaim was first presented, or rather was first noticed on Hazeltine, and in the motion which was signed by Mr. McConnell and by Mr. Curtis, it was stated first that the cause of action did not exist when the answer to the patent suit had been filed.

Now, the answer in the patent suit was filed in April, 1960.

The Court: And that is how you arrived at that number?

Mr. Kayser: Yes. And the only other act which is [20] alleged here is the cumulative act of charging infringement, and the testimony of Mr. Crotty—of Mr. Ruestow of the Hazeltine parent, and the letter which Mr. Crotty himself wrote identifies the first meeting on that subject specifically as October 18, 1961.

The Court: Are you saying to me now that in regard—as included in the finding, that that is not contained in the pleadings—the alleged restrictive practices?

Mr. Kayser: Here?

The Court: No. (a) on column 2.

Mr. Kayser: Yes.

The Court: That is not included—

Mr. Kayser: This is not alleged as an act causing damage, no, sir. It is not. As a matter of fact, if it had been, then the affidavit filed and the motion filed would have been false. It would have been false because these acts—the acts which are in the findings go back over many years.

[21] Your Honor, these acts under (a), the proximate cause of damage, could not have been in that counterclaim and have an honest, true pleading. Their affidavit would not have been truthful.

The Court: Have you read paragraph 4 of the counterclaim—

Mr. Kayser: Yes, your Honor, I have.

The Court: That clearly sets forth that their complaint has to do with their—

Mr. Kayser: Yes, it does, your Honor. It says that the complaint has to do that, but that is not alleged as the acts causing the damage. Sure, in the trial—and this is one of the reasons that Mr. Dodds was so confused as to the exact theory. He was entrapped because, day after day, we heard about all of this background material about this well documented international conspiracy. And I—the record—the error was blue with this. But this, under the theory of the action as pleaded, was merely background. These were not the alleged acts which are claimed to have caused the damage.

[22] The Court: You may proceed.

Mr. Kayser: All right. Now, your Honor, I submit that as this case has developed, that your Honor would be perfectly justified under the Park and Tilford case which is in our brief to dismiss the action, to dismiss the counterclaim completely. As a matter of fact, Mr. McConnell, during the trial, in effect admitted the counterclaim as pleaded right out of Court.

The Court: Are you later on going to get down to this overt act theory of yours?

Mr. Kayser: You mean as concerns—

The Court: The theory of damages.

Mr. Kayser: Yes, yes.

The Court: I don't want to get you off the track. I want to follow your—

Mr. Kayser: Your Honor, it is my job to answer any questions or try to answer any questions you have. That is my first job.

The Court: I mean, if you don't get to it, I am going to ask you about it.

Mr. Kayser: We will. I'm just pointing out, actually, Mr. McConnell has admitted his counterclaim as [23] pleaded right out of Court. Because your Honor may recall at one time during the trial, when he was examining Mr. Crotty about all this correspondence having to do with a license negotiation, that at page 622 of the record, Mr. McConnell showed him a letter of May 20, 1963 in this course of correspondence from Mr. Ruestow to Mr. Crotty, and you asked, "This I assume is all offered under the misuse theory."

"Mr. McConnell: Correct. It didn't have anything to do with the overall conspiracy."

So their affidavits, when they filed their original counterclaim, admitted that the pendency of the infringement suit was not an act of causing damage. Mr. McConnell admits that the evidence having to do with negotiations or licenses later on have nothing to do with the conspiracy.

So, really, the counter-claim as pleaded—they have admitted that they have no cause of action on that. And if your Honor noticed that Park and Tilford case, the Seventh Circuit said there, when exactly the same procedure was tried, only more openly, to plead one cause of action [24] and to prove another, and Mr. McConnell asked leave to amend, to prove—originally to charge the new cause of action, the trial court said, "You can't do it; you are prejudicing the defendant."

He went ahead and put in his proof anyhow, and he tried to again amend, and the District Court here said, you can't do it, dismissed the counterclaim as pleaded, and the Seventh Circuit affirmed.

I say, your Honor, you would be entirely justified on this record in doing the same thing here.

[25] The Court: I think the thing for you to do is try and convince me that the proximate cause of the injury, which are in the findings, weren't alleged in the counterclaim.

Mr. Kayser: Weren't alleged as the cause of injury?

The Court: Yes. Would you care to try to do that?

Mr. Kayser: Yes, your Honor. If that is the sole problem in your mind, whether or not—

The Court: That is one of the problems in my mind. In this case there can't be a sole problem.

Mr. Kayser: Yes, I am afraid you are right.

The Court: I mean, with the hundreds of pages of material that you have filed in the past week, there can't be a sole problem.

Mr. Kayser: Yes; yes.

But as concerns the question whether the alleged restrictive practices be pools, going back over many years, as the findings say so often, involving refusal to license imports and threats to sue infringers, whether or not those alleged acts are charged as the cause of damage—

The Court: You have my point.

Mr. Kayser: Yes, your Honor, and I think that [26] there is a perfectly clear answer to that in paragraph 9 of the counterclaim and in the affidavit and motion which were filed here by Mr. Crotty and Mr. McConnell.

I read from paragraph 9, which says:

> "The acts performed by counter-defendant and his co-conspirators, pursuant to the unlawful conspiracy alleged herein, were the direct and proximate cause of loss and damage to counter-claimant, which injury is continuing and includes—"

The Court: Stop at the semi-colon there.

Mr. Kayser: Yes.

The Court: Doesn't he say the unlawful conspiracy alleged therein, and isn't there prior to that reference to this restrictive practice in regard to imports?

Mr. Kayser: Yes, but he says—

The Court: And isn't that alleged to be the conspiracy?

Mr. Kayser: Those are not the acts alleged to cause the damage, your Honor. Those are not the acts on which [27] he is suing. Those are not the acts on which he is suing, because as I said before, if he were suing on those acts, his affidavit couldn't stand up.

But I would like to proceed and then get—

The Court: Let's get to this semantically.

[28] Mr. Kayser. All right.

The Court: Paragraph 9 says:

> "The acts performed by the counter-defendant and its co-conspirators pursuant to the unlawful conspiracy alleged herein were the direct and proximate cause of loss and damages to the counter-claimant, which injury is continuing and includes—"

That doesn't make the following A, B and C exclusive of all other things, does it?

Mr. Kayser: Possibly not by itself, your Honor, but I don't think that you can fragment either this paragraph of a pleading or the circumstances under which it was filed.

The Court. I am not trying to fragment it, I'm trying to keep it all together.

Mr. Kayser: Yes.

The Court: If the language permits it to be done.

Mr. Kayser. Yes.

But A and B have to do with this fifty thousand fifty odd dollars,—

The Court. That is right.

[29] Mr. Kayser: —and C is the one to which I am addressing myself here.

Then he says:

"Because of the pendency of this suit and counter-defendant's other charges of infringement described in paragraph 7—"

Mind you, your Honor, it says:

"Because of the pendency of this suit and counter-defendant's other charges of infringement described in paragraph 7 above".

The Court: Which all have to do with American patents and not pool patents.

Mr. Kayser: Yes. "Counter-defendants" I think he means, obviously, "counter-plaintiff," or "cross claimant" or whatever—"has been forced to delay expansion of its foreign trade in England, Canada, Australia and other countries where in furtherance of the conspiracy alleged herein counter-defendant's inventions and patents are employed to restrain and prevent importation and trade. But it is because of the pendency of this suit and counter-defendant's other charges."

[30] Now, if we will go on to the—

The Court: That, in your opinion, knocks out the prior reference to the conspiracy to prevent importation.

Mr. Kayser: Well, yes, your Honor, of course he had to—

The Court: Even though it says it includes and doesn't say excludes all other causes of action.

[31] Mr. Kayser: Yes. Yes, and I would like to go for a moment to the Prayer, because I thing this is also very instructive in determining what Mr. McConnell was saying at that time.

He says:

"1. He prays a judgment against counter-defendant for treble the amount of damages sustained by defend-

ant as the proximate result of said acts of counter-defendant and its co-conspirators and for costs and attorneys fees."

The Court: I mean, what acts do you say "said acts" apply to?

Mr. Kayser: "said acts, the pendency of the suit and the other charges of infringement."

The Court: All right.

Mr. Kayser: Now, I would like to inject one comment here, and that is his references always to the acts of counter-defendant and his co-conspirators; obviously what he is doing there is what he has done all the way through this case, is to say, "You have got a conspiracy and, therefore, your acts are his acts and his acts are their acts," and that is what he means when he talks about—

[32] The Court: Well, certainly in regard to the American patents, there was no evidence or any charges in the pleadings in regard to a conspiracy in regard to the American patents, was there? I mean, this is strictly put on Hazeltine, on their package deal thing and Hazeltine had no co-conspirators in regard to American patents, did they?

Mr. Kayser: Well, your Honor, I agree, but Mr. McConnell said that they did.

But what is his theory here?

I mean, how could there possibly be a theory here?

Well, it is a far-out theory, but he elucidated it during the trial and pre-trial; his theory was that these acts were detrimental because if there were counter-part patents in England, or Canada, or Australia, or wherever, that if he took a license here or if the patent was found valid here that then this would somehow aid the foreign pools to enforce the counter-part patents, and that was his entire theory in this make-way antitrust counterclaim as he filed it. Maybe it doesn't make much sense, your Honor. I

agree that it doesn't either. It was a make-way counter-claim.

The Court: I agree, too.

[33] Mr. Kayser: It was a make way counter-claim.

But I would like to refer briefly, if I may, to these affidavits—

The Court: You may refer briefly or at length, whatever your pleasure is.

Mr. Kayser: Thank you.

The Court: I have indicated that there would be no limitation on this, because a substantial question and sum of money is involved and, therefore, there will be no limitation.

Mr. Kayser: Yes. I would like to refer to the Crotty affidavit of March 21, 1963, which was served on Hazeltine on March 26, 1963, at the time they were originally proposing the counter-claim which actually wasn't filed until later.

He says that:

> "The matter as alleged in paragraphs 6 to 9, counts 1 and 2 of defendant's counter-claim to which this affidavit is attached, and which are the proximate cause of damages alleged and require the release sought in said counter-claim occurred after the filing of the [34] answer herein."

Now, he is expanding it a bit. Instead of saying the damages, or the acts or what is alleged in 7 to 9, he says it is in 6 to 9. These are the acts which require the filing of this suit or this counter-claim, he says, some two years after the answer was filed, these are the acts which caused the damage, these are the acts complained of.

Your Honor, your general conspiracy isn't there, and we are right back—the one thing he does is buttress the very fact that he was relying on the threats of infringement plus the suit, because paragraph 6 merely talks about some more

and a little bit earlier, possibly, license negotiations, which weren't included actually in the counter-claim. But so far as the international conspiracy as being the act that caused the damage, he clearly rules it out, and what is more, Mr. McConnell also clearly rules it out in his motion, because he says—

One of his motions he said:

[35] "Said counter-claim arises out of the matters set forth in paragraphs 12 and 13 of defendant's answer."

Those are the general allegations, yes.

> "—herein and current related unlawful activities of plaintiff occurring since the filing of the answer—current related unlawful activities of the plaintiff occurring since the filing of the answer, which activities are the proximate cause of present and continuing damage to defendant sustained after the filing of the answer."

Now, we have got not only the counter-claim, we have got the motion of two of Zenith's lawyers as officers of this Court, we have got the affidavit of the third lawyer as the officer of this Court, and I think that buttons it down, your Honor, as clearly as it can be.

The Court: Now you are referring to your B on the chart, is that it, as to the period of damage?

Mr. Kayser: No, no, I am referring to A and B [36] because these current activities that they were talking about are these, the pendency of this suit, the alleged charges of infringement.

The Court: All right.

[37] Mr. Kayser: All right.

Now, as concerns the cause of action which actually came out in the findings, and I think possibly to some extent crept out at the latter stages of the trial but were never, never stated until the findings, were never, never put in

an amendment to the pleadings, were never announced to Hazeltine, and that theory of action is the one as I say here at the right in which Zenith now relies on the activities of these pools going back over many years. Yes, they limit themselves as to damage to the four-year period before they filed their counterclaim, but when they ask for damages they ask on the basis of what I call, and I think quite properly so, the theory of a fully-matured market, and I have here, your Honor, a chart which we have prepared and which I think shows very graphically the difference between what was pleaded and the difference of what is in the findings, and the very, very grave effect this has concerns the problem of Hazeltine to defend and, of course, the problems of this enormous prospective possible judgment.

Here, your Honor, is what they pleaded. They [38] pleaded this loss of profits and delay in expansion during the period October 18, '61, to May 22, '63. Just what this is supposed to have been—you see these red question marks, they are question marks because they never bothered to put in any evidence on the subject and we haven't the slightest idea what they claim in that respect. But it is clear that all they were asking was damage during this period from these acts and only delay and expansion.

Now, what was it that they came up with in their findings and in their Exhibit 218?

Mr. Wright got on the stand, and on the basis of Zenith's experience in the United States, where they have been in radio since 1923 and in television since about 1948, said we have got—Oh, he estimated 20 per cent of the American market. I think he was puffing, as a good executive, good salesman should do, but the figures that they came up with, he said that on the American market, as of June 1, 1959—they changed the date for convenience, I guess, by nine days—that Hazeltine—or, rather, Zenith had 15.6 per cent in

this case, and this chart has to do with television, 15.6 [39] per cent of the American television market on that date, and he thought that Zenith could do at least as well in Canada, so that had it not been for the acts of these pools and conspirators that on June 1, 1959, Zenith would have had 15 per cent point 6 of the Canadian television market.

He guessed that except for these pools Zenith would have had maybe half as much of the English market as the American market and—

The Court: Half as much or twenty-five—

Mr. Kayser: Well, he said half as much, but Mr. Kaplan corrected him, your Honor, and cut it down to 25 per cent.

On Australia, Mr. Wright wasn't asked to testify, but Mr. Kaplan decided—I don't know how he decided it, but he decided that they should claim damages for 10 per cent and that that would be the basis that they would, except for the pools, they would have had a fully matured market in Australia equal to 10 per cent of their American share, and I think that came up somewhere between 1 and 2 per cent.

[40] But, in any event, translating these claims to Canada and to TV, this is—this chart, this page number 2, is what it comes to. They say that Zenith should have had 15.6% starting June 1 and this 15.6 December 31, 18%, December 31, '60, and so on, and then they say that here is the per cent of the Canadian market in black, Zenith Canadian sales and, therefore, this loss of profits which they are claiming for Canada television is all this vast area of red which is not just delay in expansion, this is a fully matured market, your Honor. It isn't just from October 18, '61, it is from May 22, '59; so I think you can see quite graphically from that just what a startling change, what the startling economic effect is to Hazeltine, rightly or wrongly—maybe it should have been caught. I say there

was a degree of deception and entrapment here which justifies that the thing was not caught, but here is as graphic an explanation and picturization as I can give of the tremendous effect of this silent shoe horning in of a new theory of action.

In equity, your Honor, and that is why we filed this motion in the first place, in equity we submit that [41] regardless of who was or who wasn't at fault, this sort or thing just should not be tolerated.

The Court: This type of proof is admissible in these kind of cases, isn't it, when by virtue of conduct they are unable to get more axact figures.

Mr. Kayser: Oh, no, your Honor. No, I am not now talking about the question as to whether or not this would be a fair estimate as to what a fully matured market would be. I am coming to that later.

What I am talking about here is the fact that whereas he pleaded merely delay in expansion for eighteen months—

The Court: You are talking about the time period now rather than the—

Mr. Kayser: No, I am talking about more than the time period, I am talking about the theory, also the change in theory from the mere delay in expansion from whatever point they might have been on October 18, 1961, or even May 22, '59. I am talking about the fact that they no [42] no longer asked merely for the loss of profit from a delay in expansion but that they suddenly come in here and ask for all profits from a fully matured market. Now, whether they are right in suggesting that Canada should be parallel with the United States and that England should have a quarter as much—I mean, they should have a quarter of the same percentage in England, I am not talking about that. I am talking about the complete switch in theory, not the adequacy of the proof, if we were to assume that they were allowed to switch the theory.

[43] The Court: Do you think this is merely gilding the lily and has no legal effect in their counterclaim when they refer to the conspiracy to prevent importation of American-made television and radio sets? Is that just nice language or is that the basis of a lawsuit?

Mr. Kayser: It is not the basis of the lawsuit to which they pleaded, your Honor.

Your Honor, a party ought to have the right, when he is faced with a pleading, he ought to have the right to assume that that is the case he is going to meet, have to meet.

The Court: I know. You don't have to convince me of that. I agree with that.

Mr. Kayser: Well, all right, and if the other party wants to change, he should do so by leave of court and on adequate notice.

The Court: I think the question is whether or not they did change. I think that that is the question.

Mr. Kayser: Yes.

As I say, I cannot see this anywhere in this counterclaim.

I cannot see it in their opening statement. I cannot see [44] it in their pretrial brief. This is something which evolved silently, gradually and appeared in full force in their findings and conclusions for the first time.

The Court: Well, I can't say that, looking at the pretrial briefs, that there wasn't adequate warning that this was their theory prior to the time any evidence was adduced.

Mr. Kayser: Well, of course, your Honor, there was reference to the existence—

The Court: That is the nub of the whole question, and the nub of the damages was the failure to permit importation of American-made merchandise into these three countries.

Mr. Kayser: The nub of their damage claim was what was stated in paragraph 9, your Honor.

The Court: All right.

Mr. Kayser: Surely, the other things were in there as identification of the alleged conspiracy of which—pursuant to which these acts were alleged to have been done, but it is these acts which were alleged as being the cause of the damage.

The Court: I don't see that anything in paragraph 9 has to do with a conspiracy in regard to importation.

[45] Mr. Kayser: Sir?

The Court: I say, I don't see that A, B and C have anything to do with a conspiracy in regard to blocking importation.

Mr. Kayser: Well, they have to do with these acts which is said are alleged to be in furtherance of it, the last half of C. But the charge, I certainly agree with you so far as the charge is concerned, no, they have nothing to do with conspiracy. They have to do with the effect of these acts.

The Court: All right. You may proceed.

[46] Mr. Kayser: But I think we have to admit certainly that there are references to conspiracy all through the counter-claim. The counter-claim is full of references to conspiracy but not to those conspiracies as being the acts.

Well, your Honor, one of the grave detriments which came out of this switch, as we have pointed out in our motion and the brief, was this question of release, and say that by this switch in theory in the middle of the case Zenith apparently decided to collect for a second time for these claimed activities in the so-called Zenith-RCA litigation.

The Court: When was the RCA release signed?

Mr. Kayser: It was signed, as I understand it, on September 27, 1957.

The Court: As I understand it, they are only claiming, according to your chart, from May 22 of 1959 to May 22 of 1963.

Mr. Kayser: Yes, your Honor, that is very true.

The Court: And as I understand the pleadings and the evidence, after this release was signed, why, they had no difficulty with those patents of RCA and others as far [47] as the Canada pool was concerned or any other pool was concerned.

Mr. Kayser: That is my understanding, too, that they had no difficulty with any of those pools after the release was signed.

The Court: And the only reason importation was banned from Canada after the release was signed was because they embraced Hazeltine patents that were in the patent pool and not RCA or other patents in the patent pool, isn't that the way you understand it?

Mr. Kayser: No, I cannot agree that any patents of either Hazeltine or its parent have in any way interfered with—and I will get to this—interfered with any ability of Zenith, when it wanted to, to import into any of the three countries.

But I would like to get back to this release.

The Court: I would like to have you, and I wish you would, since I am not sufficiently astute today to understand your theory, I wish you would approach it on a first grade level so that I can understand how this—

Mr. Kayser: Well, your Honor, it will have to be on a first grade level for me to understand it, too.

[48] The Court: So that I can understand how this release in '57 has anything to do with what occurred from '59 to '63.

Mr. Kayser: Yes.

The Court: If necessary, you can draw some pictures to make it clearer to me.

Mr. Kayser: Yes, your Honor. I think my own experience is that I can understand things better if I draw some pictures.

The Court: And I will be happy to look at them in this case, because I think I need some.

Mr. Kayser: Well, let me lay the background of this first.

The Court: I think I am aware of this lawsuit and the consent decree and the settlement and that sort of thing, so that we can skip the kindergarten stage of it and start in first grade.

[49] Mr. Kayser: Well, first before we get to the release itself—

The Court: Yes.

Mr. Kayser: —I first want to point out that Zenith has taken the position ofttimes repeated, and joyfully, in this case that Hazeltine and its parent Hazeltine Corporation were conspirators with RCA, General Electric and Western Electric. We heard a great deal—prior counsel heard a great deal in this case about—

The Court: I assume on their theory of the case that prior to 1957, the date of this release, they were.

Mr. Kayser: That is their theory, that is right, which we, of course, deny.

But, nevertheless, that is their theory.

The Court: Do they have a theory that they continue to be conspirators with RCA and General Electric after '57?

Mr. Kayser: Not so far as I know, your Honor, no. But it is their theory that—

The Court: As I understand it, RCA, General Electric and Western Electric withdrew at the point of a gun from the conspiracy in 1957.

[50] Mr. Kayser: Well, I don't know whether that is—

The Court: And, having withdrawn, they are no longer responsible for the acts of those conspirators still in the conspiracy after they have withdrawn.

Mr. Kayser: I think that would be a fair statement of the law, your Honor.

The Court: That is my understanding of it.

Mr. Kayser: That is right.

The point is, they have—No. 1, they asserted that these parties were members of that conspiracy and we say they are stuck with their contention.

The Court: Do they say they were during the damage period? Do they say it?

Mr. Kayser: No, they do not.

The Court: Well, I mean, why are we concerned about whether they said prior to 1957, prior to the date of this release, that they were conspirators? What difference does that make in this lawsuit?

Mr. Kayser: If I may, your Honor, I think—I would like to come to that because there is a—

The Court: I think maybe I will just sit back and quit evidencing impatience.

[51] Mr. Kayser: I welcome all questions because sooner or later I try to get out what I would like your Honor to—

The Court: And I think that I should permit you to do so without these interruptions, and I apologize.

Mr. Kayser: As far as I am concerned, any questions that you want, I welcome them, whether or not I can answer them.

The Court: No, except that I ask these questions and you tell me that you are on your way to answering them so that perhaps if I don't ask them, you will have answered them without my asking the questions, and I am going to permit you to do so.

Mr. Kayser: Yes.

Now, your Honor, if we read this release, which we understand was given by Zenith and Rauland, its subsidiary to RCA, to General Electric, and to Western Electric in about September 27, 1957, we can prove at least one of those, and, I dare say, maybe Zenith would admit it, we

will find that the release includes—I start at the middle of the first page:

"All and all manner of acts and actions—"

[52] And I won't read all of that boiler plate.

"which against said RCA, for example, its subsidiaries and their respective successors and assigns, the said Zenith Radio Corporation and the Rauland Corporation of each of them ever had, now has—"

And here is the part that is important:

"or which each of them and their respective subsidiaries, successors and assigns hereafter can, shall or may have—"

The Court: Against who, RCA, Rauland, or against everybody in the world?

[53] Mr. Kayser: Well, may have against General Electric, RCA and Western Electric.

The Court: Very good.

Mr. Kayser: For or by reason—"For, upon or by reason of any matter, cause or thing whatsoever" from the beginning of the world to the day of the date of these presence, not including the irrelevancy about unpaid balances on goods.

The Court: Yes.

Mr. Kayser: Now, we start first with the proposition and the clear law that—

The Court: Is it your theory that this is a release of other than those—

Mr. Kayser: Oh, yes, your Honor.

The Court: —other than those who signed the release?

Mr. Kayser: Oh, yes, your Honor, the law is inescapable.

The Court: Then you get to that because that confuses me.

Mr. Kayser: Yes, the law is inescapable that this is in the nature of a joint tort; when you release one joint tort feasor, you release all of them. This is an unqualified [54] release of these three. Anybody else which according to Zenith was a party up to September 27, 1957 is released, released them for everything that they did in the past up to that time or all damage which might thereafter be suffered from any acts which occurred up to September 27, 1957. Anything which results after that date from any act done by any of them up to that date.

The Court: Is it your theory that this release releases all of the members of the Canadian pool? I want to be clear on this.

Mr. Kayser: I think so, your Honor, to the extent, to the extent that Zenith takes the position that they were a member of the conspiracies and pools which Zenith complained of in their lawsuit, yes.

The Court: What is the purpose of writing in specifically in these various releases RCA in one, Rauland Corporation in another, General Electric in another, if it—

Mr. Kayser: Well, the reason it was done in three documents, I assume, is so that each one would have one.

[55] But, your Honor, this is the law of torts. This is the law of release and there is no question about it, your your Honor, either in Federal Courts or under Illinois law clearly the release of one joint tort feasor releases them all. The only way you can get around that is by covenant not to sue. That is why the covenant not to sue is used.

The Court: And does that apply to conspiracy as well as substantive conduct?

Mr. Kayser: Yes, it does, your Honor. There are at least three cases clearly on the point involving antitrust treble damage cases.

The Court: That is by realeasing one conspirator in a conspiracy you automatically release all other conspirators from the beginning of the world to the end of the world.

Mr. Kayser: No, no, up to the time of the release and for any acts or any damage suffered thereafter by reason of acts occurring up to the time—

The Court: By another co-conspirator who is not a party to the release.

[56] Mr. Kayser: Yes, your Honor. I don't think that there is any question that that is the law.

The Court: All right.

[57] Mr. Kayser: Well, now, we come finally to the question which your Honor quite properly raised in the first place, and that was, what does the 1957 release have to do with a claim of damages from 1959 to 1963.

The Court: Well, I mean, under your theory I understand what it has to do, because your theory is that from the date of this release all other members of this pool or alleged conspiracy have been released by virtue of this Rauland-RCA-General Electric release.

Mr. Kayser: To the extent of any results from any acts which occurred up to that date.

We are not saying, your Honor, not suggesting for a minute that this is any release of any liability on account of any acts in the future.

The Court: Oh, I see.

Mr. Kayser: As a matter of fact, there are cases, and I am sure Mr. McConnell would mention them if I didn't, there are cases which say that if you try to release the effect of a future violation that that is against public policy.

Now, we are not contending that for this release at [58] all. What we are saying is—

The Court: That anything that any conspirators did up to the date of the signing of this release—

Mr. Kayser: Yes.

The Court: —Hazeltine has been exculpated or excused from by virtue of this release.

Mr. Kayser: And including all after effects of those acts,

all after effects of those acts are also released. It says so specifically.

The Court: What says so?

Mr. Kayser: The release says specifically that it includes all claims which the released party hereafter can, shall or may have, you see. All after effects of anything up to that date are released.

The Court: And it says that this applies between Zenith Radio and Rauland Corporation.

Mr. Kayser: No, they are the executing parties. That is parent and subsidiary, your Honor. They gave this form of release running to RCA, to GE and to Western Electric.

The Court: Oh.

Mr. Kayser: And, of course, we, as alleged co-con- [59] spirators, which we deny, but which is alleged, we say that under Zenith's position in this case, which it is bound by, we have the benefit of that release.

The Court: Let me clarify this further: Assuming that perhaps there was a conspiracy in existence prior to the day of this release,—

Mr. Kayser: Yes.

The Court: —and that this conspiracy continues among other co-conspirators after the date of the release, what is Zenith's position in regard to those co-conspirators in the conspiracy that continues after the date of the release which in any way have some unlawful effect on Zenith's business.

Mr. Kayser: Well, I would think, your Honor, that absent any exceptional circumstances that this release would not apply.

As I said, the release would not apply to unlawful acts which occurred after the date of the release itself. I don't think it would, and we are not suggesting that this one does.

The Court: Well, I mean, assume that the unlawful [60] acts prior to the release, that the object of the con-

spiracy and the way it was furthered, are by barring from Canada, let's stay with Canada, the importation of American made sets, barring them to the extent that they suggest to any dealers in Canada that, "If you sell American made Zeniths, you are not going to get any Canadian made sets to sell and we will drive you out of business." Supposing the same condition exists after the date of this release as existed prior to the date of that release, wouldn't that be a continuation of the same conspiracy?

Mr. Kayser: It could be, but they still couldn't collect to the extent that they had been hurt or were thereafter hurt by reason of acts which occurred prior to the date of the release.

Any cause of action which they had would have to be based entirely on acts which had occurred after the date of the release, and we are going to show your Honor—

The Court: I assume now that you are approaching, and you indicated that you would approach, the question of whether the right to recover depends upon whether [61] there was an overt act during the damage period and that if there is no—isn't that your theory, that if there is no overt act during the damage period, why, they can't collect? Isn't that what you said in your brief?

Mr. Kayser: That is right. Of course, there are two parts to that, your Honor.

The Court: I mean, you are getting to that?

Mr. Kayser: Yes. Your Honor—

The Court: I won't rush you on your way.

Mr. Kayser: I am going to dwell at great length on this question.

The Court: Very good.

Mr. Kayser: Where did anything happen which hurt them.

Your Honor, I intend to ride heavily on that one.

The Court: Very good.

Mr. Kayser: Now, if I may finally, to explain the effect of the release and the fact that it releases any resulting continuing activities, Zenith, in claiming, as they do, a fully matured market here beginning May 22, 1959—

[62] The Court: They claim they had a mature market or that but for the conduct of Hazeltine they would have had one.

[63] Mr. Kayser: They are claiming that they were entitled to the benefits of a fully matured market, yes.

The Court: Which they said they would have had, had it not been for the conduct of Hazeltine as co-conspirators.

Mr. Kayser: That's right.

The Court: All right.

Mr. Kayser: And as we shall show, not that necessarily the acts they were relying on—the after-effect of them occurred prior to this September 27, 1957, date, because we are going to go chapter and verse and right through history as to what happened after September 27, '57. And we are going to prove that there wasn't a single thing there which in any way affected their business. We are going to prove that particularly here in Canada, they were just as fat and sassy as they could be after that settlement, except only when they got over to '62 and the Canadian Government put in a tariff. We are going to show that, and we are going to show that from their own annual reports.

The Court: Go ahead.

Mr. Kayser: In other words, then, we will show [64] that this release bars all their—substantially all their claims, because when they claim the right to start at this high point and they claim they are entitled to damages on that theory, they are necessarily claiming that it was but for the acts back of this conspiracy that they would have been there.

The Court: And the release having been signed two years prior to the beginning of the damage period?

Mr. Kayser: That is right, because it released all of the after-effects of it, and they claim that but for these acts they would have been here. So it was these acts that prevented them from being there. These acts are released, barred by the—

The Court: I mean, they don't specifically say that. I mean, there is a two-year period between the date of the release and the beginning of the damage period.

Mr. Kayser: Yes, your Honor. I would like to discuss that two-year period. I would be very happy to do so.

The Court: Very good; very good.

Mr. Kayser: Now, I think, your Honor, I will proceed out of order—

[65] The Court: Is this a good time for a recess? We are going to take one.

Mr. Kayser: Yes. I'm just getting under way, so it's fine. This is a good breaking point.

The Court: All right. We will take our afternoon recess and give you a chance to re-form.

(A short recess was taken, after which the following further proceedings were had herein:)

The Court: You may proceed.

Mr. Kayser: Thank you, your Honor.

I would like to go now to a subject which I believe was suggested by one of your last questions, and that is as to actually what happened after this September, 1957, release.

Now, as your Honor knows, the mere fact that there is or may be an unlawful conspiracy or an unlawful patent pool by itself doesn't give any third party any right to any claim of damage. They are entitled to claim damage only to the extent that it can be established that something which that unlawful conspiracy did has caused the damage.

The Court: Unquestionably, I agree.

Mr. Kayser: Yes.

[66] Now, the testimony as to the so-called fact of damage in this case was given by Mr. Wright and Mr. Kaplan of Zenith. I would like to come to that later. I would like to discuss, first, just what the facts are as to the fact of damage. Was there in fact any damage suffered by Zenith after this 1957 release; was there any restriction of any sort, and damage to the import business under this new theory of theirs either in Canada or in England or in Australia?

Now, there are two products involved here, your Honor—

[67] The Court: I mean, if the conspiracy continued, do you concede that there might have been?

Mr. Kayser: Well, if we were to assume that a conspiracy continued, yes.

The Court: Let's make it nebulous.

Mr. Kayser: All right.

The Court: If there was an alleged conspiracy to start with, and if this alleged conspiracy continued, do you concede that it might have—

Mr. Kayser: As an abstract proposition, surely, surely.

The Court: All right, fine. Very good.

Mr. Kayser: Now, as I said, the products involved here are radio and television.

The Court: Yes.

Mr. Kayser: Now, as concerns radio, the question of any damage to Zenith in connection with imports of radio into these three countries, I believe that on the face of this record, as we said in our memorandum, we can forget that because Zenith has admitted that by this time there were no significant radio patents which could have been used by anybody to keep them from importing.

But I also want to point out that even irrespective [68] of that fact, the proof—

The Court: Well, assuming that there weren't.

Mr. Kayser: Assuming that there were, sir?

The Court: That there were not any such patents, what would the effect be on Zenith if, despite the fact that there were no significant patents involved in radio, they continued to threaten retailers with loss of Canadian products if they continued to sell Zeniths?

Mr. Kayser: Well, of course, there never has been any evidence or suggestion—

The Court: Well, there was some evidence that at one time that occurred.

Mr. Kayser: The contention was, and there is some claims in years past, that dealers were threatened with infringement suits if they sold imported sets.

The Court: That's right, which would cause them to hesitate and pause to continue to sell Zenith—measuring the disadvantages of selling Zenith or defending themselves in an infringement suit.

Mr. Kayser: Yes. Well, I think we can possibly agree that if there were anything like that, if [69] there were any such facts and circumstances, that that could interfere, yes.

The Court: All right.

Mr. Kayser: But the fact of the matter is, your Honor, there is no evidence in this record that there were any such during this four year period.

The Court: All right—or in the two year period preceding it?

Mr. Kayser: There is one claim as concerns Canada, and I'm coming to that, but during the '58 to '59 period—in late '58 and the early months of '59, there is some ambiguous testimony that a Mr. McConnell—not the same gentleman—of the Canadian pool is supposed to have made certain implications against Zenith, and also that in '58 there was some question, I believe, in the record as to

whether some statements weren't made to some Canadian dealers, yes. Except for that, and that's prior to the four years, there is no evidence in this record.

Now, I first want to turn to the subject of Canada and what happened after the 1957 settlement. I think I can demonstrate on the basis of Zenith's own annual report [70] that there wasn't one plugged nickel's worth of damage suffered by Zenith by anything claimed to have been done by these Canadian pools, or this so-called Canadian pool.

[71] The Court: Is there something in the reports that indicate Zenith, during that period, had the same share of the Canadian market that they had of the U. S. market?

Mr. Kayser: No, no, they never did, your Honor. They never did.

I would like to hand up an excerpt from Zenith's annual reports. We have reproduced copies of all of the reports here in total, and these are excerpts from them.

Now, I would like to point out, first, the excerpt from the 1957 report. This is the annual report to shareholders, your Honor, and it says there—this is '57—it says, "In addition, your company is inaugurating an aggressive program to set up distribution of radio and television receivers in Canada where it has previously been excluded from participation in the market through the operation of a cartel."

And there is a description there of what they are proposing to do. So we see here the reference to the asserted cartel and to Zenith's efforts to go into Canada. The cartel —I suppose this is the familiar Zenith-RCA litigation settlement.

[72] So we come, next, to—

The Court: That of course could refer to the question that they now were at liberty to sell in Canada—

Mr. Kayser: Yes.

The Court: (Continuing) sets that involved patents of RCA, Westinghouse, and General Electric. I mean, that could refer to that.

Mr. Kayser: I think—well, your Honor, I don't think so. I think that would be a great stretching of the language. This is supposed to be their reports to their shareholders.

The Court: I understand that. But, I mean, you agree that after this release, they then were free, without threat of infringement, to sell in Canada sets that only embraced patents of those companies with whom they—to whom they had given a release. You agree that they were now free to do that, don't you?

Mr. Kayser: Yes.

The Court: However, there is nothing in those releases which barred threatened infringement suits from Hazeltine and the pool in regard to other patents in the pool that [73] weren't the subject matter of these releases; isn't that true?

Mr. Kayser: I believe that's correct.

The Court: So that expanding in the Canadian market—I mean, it would be a fair interpretation to say that they now were home free in regard to these particular patents, the subject matters of the releases.

Mr. Kayser: Your Honor, that isn't what it says.

The Court: That isn't what it says?

Mr. Kayser: It says they previously had been excluded from participation in the market through the operation of a cartel. It's quite clearly indicated, as far as they are concerned, they are free to go.

The Court: I mean, I agree that that is an inference that can be drawn from that statement. I agree with you.

Mr. Kayser: Yes, sir. And if I may, I would like to now go to 1958.

The Court: Of course, nobody ever passes on bad news to stockholders unless—

Mr. Kayser: I don't agree with that, your Honor. Zenith does.

The Court: Unless the figures from the year [74] before make it necessary to do so. In regard to the future, stockholders are always given a rosy picture.

Mr. Kayser: Your Honor, I don't think that that is the case. These—and this is a matter of great significance that I will come to later. These reports on Zenith's subsidiaries and exports are just full of statements about the good and the bad problems, and the tribulations of exporting with the subsidiaries. It's very exhaustive, and it's very significant that it is exhaustive.

[75] The Court: Very good.

Mr. Kayser: Now, when we come to 1958, we see that Zenith Radio Corporation of Canada, which was previously engaged exclusively in distribution of hearing aids, during the year initiated the distribution of radio and television receivers in the provinces of Ontario and Quebec, and there is more discussion on that.

Then we go over on to the next page, the excerpt from page 6. We see that during the year an aggressive sales and operating organization was added to the personnel of the company subsidiary, Zenith Radio Corporation of Canada, to initiate the distribution of radio and television receivers, and so on.

So, now, we see that the plans in '57 are starting to be carried out in 1958.

All right. Now, let's go to the year 1959, the first year involved in this claim of Zenith's for all the loss of market due to the terrible activities of these pools. What do they say? They say on page 3 of these excerpts—it actually is page 6 of the report—they say, "The company's [76] Canadian subsidiary, Zenith Radio Corporation of Canada, showed marked progress in the sales of all products." Down below, "The radio and television division established

in 1958 doubled its sales over the first year, and in the closing months achieved a substantial gain in its percentage of industry sales despite a decline in overall Canadian industry sales of television receivers."

And they say down below there, they talk about the gratifying performance, and so forth.

Your Honor, right there they are talking about the same year where they claim we owe them all this money because we were interfering with their activities in the market place. Which is the fact? Is it the fact what they tell their shareholders, as a matter of corporation law, SEC regulation, and so forth, or is this the fact? They can't both be the facts.

Now, let's go on to 1960.

The Court: I mean, doubling its sales in 1959 could mean that they sold 2 television sets instead of 1.

Mr. Kayser: That's right.

[77] The Court: Than in 1957.

Mr. Kayser: That's right—

The Court: 2 television sets instead of 1.

Mr. Kayser: That's right.

The Court: That would double the sales. I don't know what that would mean, but certainly they wouldn't be misinforming their stockholders if that was—

Mr. Kayser: I wouldn't think so. But it does indicate that their business is flourishing at that time, certainly. And I want to come back to this question, had there been other factors, would we have heard about it in these reports or would we not. I'm coming back to that.

Now, in 1960, they say, again at page 4, "The Zenith Radio Corporation of Canada, Limited, in 1960 successfully countered again the downward industry sales trend which began in Canada in 1955, and made important gains in the sale of Zenith television and radio receivers."

That is another one of the years where they were supposed to be damaged so much by these pools.

[78] All right. Let's go to 1961, which is also in the period. We see the statement that they made at the bottom of page 4 that

> "The Zenith Radio Corporation of Canada made gratifying progress during the year selling more television receivers than in the two previous years combined, and they have a lot of enthusiasm and created a growing demand for Zenith products."

And that is reflected here, your Honor—we are going up, up to 5 per cent here. But there is one disquieting note in this report, and that is that Zenith—the fact is commented on at the middle of page 4 that

> "Profits were adversely affected during the year by the Canadian Government's action which put the dollar at a discount."

In other words, the government was stepping into the picture—the Canadian Government, not the Canadian so-called patent—the Canadian Government.

Then we come to 1962, and what do we find? They say:

> "Profits were again affected by curbs established by the Canadian Government. Its action in establishing an [79] exchange ratio which further discounted the Canadian dollar in relation to the U. S. dollar, and the imposition of additional tariffs presented serious obstacles to the Canadian operation."

As I recall, I think our offer of proof shows that the tariff went from 20 to 30 per cent. Of course, here we see it. Sales are down, but this cannot be ascribed to Hazeltine. It cannot be ascribed to any pools. This is the doing of the Canadian Government.

So, your Honor, we see that by Zenith's own reports,

their business has been good since '57. It has been flourishing except for the act of the Canadian Government.

We have then still the question, under those circumstances, of what is the theory of asking Hazeltine to pay for the difference between 2.6 and 15.6 per cent. Certainly it cannot be on the basis of anything which happened during these years. It can't be during the period of these annual reports. It must, therefore, necessarily be on the theory that but for the acts going back here, Zenith could have, [80] in the same period that it built up to this big market in the United States—Zenith could have built up its Canadian market. But the thing is, it got the release in '57.

All right. We have a couple of more countries to consider.

Incidentally, your Honor, on the basis of this kind of evidence and on the basis of that record, Zenith is asking Hazeltine to pay some over nineteen million dollars, despite their own annual reports, which we suggest ought to be considered to be far better evidence than the estimates, the guesstimates, that were made on the witness stand. Their annual reports are something they are bound by. These are admissions, your Honor.

Now, on the subject of England, I want to point out there that, again, Zenith proceeded on the theory of the fully matured market, and that in the case of television it claimed damages on the basis that from such fully matured market, that they should have had as a fully matured market—it's not the same height, obviously, but it's roughly 4 per cent of the English market beginning right again on May 22, '59. Again, we start with a fully matured market on [81] May 22, '59. Actually, they move it up to June 1, '59. From that date we are entitled to all the profits from the developed market. That is their theory.

[82] The Court: These releases covered all the countries of the world; correct?

Mr. Kayser: Oh, yes; oh, yes. As a matter of fact, in the record in this case, we see numerous references by Mr. McConnell to England and Canada and Australia, and the pleading in the Zenith-RCA case specifically referred to all three countries.

The Court: All right.

Mr. Kayser: Now, despite the fact that they claimed the benefits—the profits from the so-called fully matured market—that's what I call it, and I think that is a correct description of what they have asserted—we find in this case that Mr. Wright at page 1057 of the record testified that Zenith had found out somehow during the Zenith-RCA case that because of currency restrictions, they couldn't have sold in England or Australia anyhow, despite any pool restrictions, because by reason of the laws of England and Australia they were barred. So we see that Zenith certainly was aware of this type of restriction in England. They admittedly knew it as late as September, '57. But nevertheless, when we came to their theory of action [83] in the spring of 1964, we find them claiming a fully matured market and saying, but for the acts of the English government, but for the acts of this English pool, they could have had 4%, or 3.9 plus of the market. They don't blame the government. They blame the pool, and then they say they want to collect from Hazeltine some twenty-eight million dollars.

Well, now, I suggest that Zenith has a pretty short memory when it comes to the restrictions of foreign laws. And as we pointed out in our offer of proof, not only was there in fact an embargo on the importation of radio and television into England in September, 1957, that embargo actually lasted until June 8, 1959—in fact, some three weeks

after they claimed they should be having a fully matured market, and they want to blame Hazeltine for it.

The fact of the matter is, it was the English government that was keeping them out of it. It wasn't Hazeltine. If they don't like it, they better sue the British Commonwealth.

Now, we have a little bit more additional corroboration on this embargo, your Honor. We have—first, this [84] we would be prepared to prove—some more details on that. We also have a cable from the British Board of Trade, which is a branch of the English government which administered it. And for ease in reading, if your Honor desires, we have had the cable typed up because the printing is rather hard to follow. It's hard to read. As a matter of fact, I received, and haven't had a chance to digest it, a whole raft of the English statutes and regulations of the Board of Trade and so forth. But I say they just came in, but here we have got a group of papers on this same subject. And I think it is indisputable that until June 8, 1959, the laws of the British Commonwealth or United Kingdom prevented the importing of radio and television from the United States, and yet here we have Zenith asking to hold Hazeltine for the damages on the basis of some theory that Hazeltine or these pools interfered with the development of a fully matured market. And it wasn't that at all; it was the English government.

The Court: Do you agree with the theory that sometime litigation must end?

[85] Mr. Kayser: Yes, your Honor.

The Court: And these offers of proof are now being made more than one year after the proof closed on this case?

Mr. Kayser: Your Honor, this I think is one of the most unusual cases that will come into a Courtroom, in that we have here, as I think we can demonstrate—without

basis we have here the danger of a judgment of almost forty-nine million dollars which will spell corporate death, which is subject to the affirmative defenses of limitations and of releases. This forty-eight million dollars is to be based on Exhibit 218 which is a group of papers, I submit, which was gotton together so hurriedly that it wasn't even typed. That, your Honor—that forty-eight million dollars, this group of papers, and I suggest that—

[86] The Court: I just got through instructing a jury that in deliberating on their verdict, they should not take into consideration either sympathy or prejudice.

Mr. Kayser: Your Honor, I submit that a jury and most certainly, I respectfully say, that this court—

The Court: That rule also applies, I assume, to bench trials.

Mr. Kayser: I submit most respectfully to this court that this court should take into account equity. This is not a matter of sympathy. This is a matter of equity and a matter of justice; that this judgment, which will spell the death of this corporation, has had absolutely no basis whatsoever. It is subject to affirmative defenses. It was accomplished by a subtle switch in theory. Maybe it should have been caught; maybe it shouldn't. But is your Honor going to penalize this corporation—

The Court: I mean, it wasn't even caught 90 days after the proofs closed.

Mr. Kayser: I agree, that's true. I agree. This is a very unusual case; we recognize that.

The Court: You may proceed.

[87] Mr. Kayser: Now, on the subject of these regulations, the fact that Zenith couldn't have imported under any circumstances until June 8, 1959—does it by any chance happen that Zenith pleaded the way it did without knowledge of these restrictions? In other words, in good faith did it somehow think that, well, maybe we were interfered

with and didn't know anything about these English regulations?

Well, they knew about it in '57, Mr. Wright admitted that. But they also knew about them in 1959 because, again, it shows in their annual reports at the bottom of page 2 to 3 of these excerpts. They talk about the appointment—

The Court: Are these the same excerpts you gave me before?

Mr. Kayser: No. This is the same document, sir, but a different paragraph.

The Court: All right.

Mr. Kayser: At the bottom of page 2, they say:

> "Our exports to Europe in 1959 improved slightly due to the appointment in mid-year of an energetic independent distributor in the United Kingdom. For [88] almost thirty years previously, the British market had been closed to our product because of cartelizations and restrictions."

They knew about these restrictions and yet they still, even though it was the English Government that was interferring with the development of their matured market prior to '59—

The Court: What are you reading from? I mean, let's see if I have it before me. The one headed "United Kingdom Embargo"?

Mr. Kayser: No, I'm sorry, sir. It is headed, "Excerpts from Zenith Annual Reports."

The Court: You mean going back to the one you used in regard to Canada?

Mr. Kayser: Yes, yes, at the bottom of page.

The Court: I see.

Mr. Kayser: There is a specific acknowledgment from the bottom of page 2 to the top of page 3 that they knew of these restrictions. They told their shareholders about it.

The Court: Well, they don't attribute it to barring by the British Government. They say:

"For almost thirty years previously, the British [89] market has been closed to our products because of cartelization and restrictions."

Mr. Kayser: And restrictions.

The Court: They don't say restrictions. Cartelization and restriction.

[90] Mr. Kayser: Well, your Honor, Mr. Wright—

The Court: What the restrictions were, I don't know.

Mr. Kayser: Yes.

Well, Mr. Wright admitted they knew about them in '57 and we proved that they lasted until June of '59.

The Court: I mean, is it your position that it was solely governmental restrictions and nothing else, and that they gratuitously threw in this phrase "cartelization" when cartelization was not a factor?

Mr. Kayser: I don't deny they used those words, your Honor, but I deny that they have any basis to claim damages because they did not develop a mature market by May 22, '59.

The Court: Due to what?

Mr. Kayser: Sir?

The Court: Due to what, they didn't develop a mature market.

Mr. Kayser: They have no right, in law, to say that due to the restrictive acts of the pools that they couldn't develop a market by May 22, 1959, when the British Government wouldn't let them come in anyhow.

[91] The Court: They did say that in 1959 in their annual reports.

Mr. Kayser: They said—they referred to cartelization and restriction, yes.

The Court: Yes.

Mr. Kayser: They referred to cartelization, and I say that they had no right to hold Hazeltine liable on any theory of co-conspiratorship or otherwise when the reason they couldn't come in was because the British Government wouldn't let them come in.

The Court: And they were in error, then, when they informed their stockholders that they couldn't get in because of cartelization, is that it? They misinformed their stockholders when they said that?

Mr. Kayser: That is not my point, your Honor.

The Court: No, I know it is not your point, but it is your position, isn't it, that cartelization had not banned them?

Mr. Kayser: Yes, but let me assume as a supposition that there had been cartelization.

The Court: Yes, but, I mean, if it was cartelization it had no effect on their business, they were then misinforming their stockholders.

[92] Mr. Kayser: They were misinforming their stockholders—

The Court: That cartelization kept their products out of Britain.

Mr. Kayser: Yes, they were misinforming them because it was the British Government that—even if there had been no patent pools, no alleged restrictions, no nothing—

The Court: Do they give any greater credence to this misrepresentation than what they said in regard to Canada?

Mr. Kayser: Sir?

The Court: I say, you have relied on—you say they are bound by what you said in regard to Canada.

Mr. Kayser: Your Honor, a party is bound by his admissions. He cannot take advantage of his affirmative self-serving statements.

The Court: I fail to see how cartelization is a self-serving statement.

Mr. Kayser: Well, I mean, but so far as suggesting now—

The Court: It is a misrepresentation.

Mr. Kayser: But so far—if you are suggesting now that because we hold them to their Canadian admissions [93] that we somehow should be held to the notion that a cartel kept them out, I—

The Court: It does indicate some inaccuracies in their statements to stockholders.

Mr. Kayser: Yes, it does.

The Court: All right.

Mr. Kayser: Because the true fact of the matter is that cartel or no, they couldn't have come in. They couldn't have come in.

The point has also been made to me to defend Zenith's annual report on that, and that is that when they talked about cartelization for thirty years in there, in that report, and, as a matter of fact, these governmental restrictions that we have talked about, my understanding is, did not last the full thirty years, it was just from—as far as we know, from about 1951 on to 1959; so to that extent, their statement could be accurate in that the—

The Court: It would cover the period prior to '51.

Mr. Kayser: Yes.

The Court: All right.

[94] Mr. Kayser: Now, on the subject of these annual reports, and on the whole subject of damage in Canada, in England and Australia, there is a very interesting thing in these reports, or, rather a very interesting thing not in them. If your Honor will examine these excerpts, and if the reports are examined, we can see that there is a very detailed set of running comments each year concerning their export problems and their subsidiaries. There is talk, for example, in 1957, about the problem of nationalistic protection of local industries, dollar convertibility; '57 they

talk about the end of the cartel in Canada, and then in '58—they have comments here in '59, they talk about severe foreign competition from Japan, heavy inventory in Japan and so forth. '59 they talk about the end of the cartelization in Great Britain. But there is one thing missing, very significantly, and that is, your Honor, that there isn't anywhere in any of these reports one single word, there is not one single, solitary word about the—in this four year period, about the Canadian pool or about the English pool or about the Australian pool that over all of these [95] years is supposed to have caused them over this sixteen million dollar damage. They talk about low priced Japanese competition, they talk about nationalism, they talk about tariffs, they talk about all these other factors, and, yes, although they are giving their shareholders, and obviously giving their shareholders, to the best of their ability a thorough rundown about the problems and the trials and the tribulations they have, there is not one word about all of the so-called vicious pools who have caused all of this so-called sixteen million dollar damage. Now, I think that that is an admission by silence that I would like to know the explanation of.

The Court: I think maybe the explanation is the same as the efforts that are sometimes made by lawyers to impeach a witness by asking him whether or not the last time he was on the witness stand or at a deposition he said so and so, which he now says from the witness stand and when the witness says, "No" and the lawyer says, "Why?" the witness answers, "I wasn't asked."

[96] Mr. Kayser: Yes, but your Honor, they considered they were being asked because they were telling all of these things. They were telling all these things. But in this case—

The Court: I know of no requirement that you cry on

your stockholders shoulders each year in your annual report.

Mr. Kayser: Well, they did when they thought they had something to cry about. They did, your Honor, that is the point.

The Court: All right, it may be because they were not asked.

Mr. Kayser: Well, they were volunteering on everything else.

Now, I think on this subject of damage in England, I think a little piece of evidence here in this record which pretty clearly indicates just how reliable this testimony is that they put in on share of the market and damage and so forth—your Honor may recall that there was quite a bit of testimony in this case in connection with this claim of loss of profits as to the adaptability of an American television set for use in England.

[97] The record will show that your Honor asked a question or two on that subject himself.

Now, Mr. Wright, who was the lead witness on this subject, said on examination, well, there were some simple repairs and operations which a distributor could make in his backroom.

The Court: With a screwdriver.

[98] Mr. Kayser: With a screwdriver. You remember it, sir.

Mr. Kaplan repeated this and Mr. McConnell quite grandly added the finishing touch when he said that all the changes that were necessary the distributor could make in his back room with a screwdriver.

Now, we have included in our offer of proof an outline of the testimony which would be given by Mr. Bernard Loughren, who is an acknowledged authority, expert in this field. This is Item 5 of our offer of proof, and I would submit, your Honor, that if anybody can do this in the back

room of his store with a screwdriver, he is more than a genius, he is a magician, because this list shows a great many changes that need to be made, a great many parts that have to be substituted. There are all sorts of things in here which I must confess, not being a television authority, I can't understand, but it shows quite clearly that this would be a major job, and the fact of the matter—

The Court: As I recall, Mr. Loughren was in the courtroom after the statement was made about the screwdriver [99] and was not called to rebut the statement.

Mr. Kayser: As I recall, your Honor, he was here on the patent side of the case, not the antitrust side.

The Court: I am sure he was available.

Mr. Kayser: Well—

The Court: Working for Hazeltine, I am sure that he wasn't more than two hours by plane away.

Mr. Kayser: But the fact of the matter is that the testimony on that point is after the matter was investigated, as Zenith should have investigated it, Mr. Loughren investigated the matter. As this offer of proof shows, he obtained diagrams of typical Zenith sets. He obtained from the United Kingdom information as to their requirements, and after he had obtained all of this material he then is prepared to testify according to this offer of proof.

Now, your Honor, this is not something you can do overnight.

The Court: As I understand it, people are supposed to get ready for trial before the trial starts and not a year later.

Mr. Kayser: Yes, your Honor, if they know what [100] the cause of action is that they are supposed to defend against. That is the problem in this sort of thing. That is the problem.

The Court: All right.

Mr. Kayser: Our third country is Australia, where the

demand is rather more modest, they only want $700,000, or, roughly, $2,000,000 trebled, and they claim there, again, that they should have started with 1½ per cent, roughly, of the television market and 1.3 per cent, roughly, of the radio market, and that Hazeltine should make good the profit they say that they should have gotten from that, although the fact of the matter is that they never even tried to go into Australia. And it is also the fact of the matter, your Honor, that as this—

The Court: Having tried to go to Canada and England and having been rebuffed in the fashion they were, and knowing that the Australian pool's terms were identical, must they go through the motions of trying to get into Australia?

Mr. Kayser: Well, your Honor, they didn't know the terms were identical, because they weren't. They could have gone into Australia. They never really were [101] concerned to try it.

The Court: You mean there was nothing in the Australian pool arrangement about imports?

[102] Mr. Kayser: That is right, they could go into Australia. They can go into Australia today. The fact of the matter is that the evidence which they referred to on Australia is of two kinds; one is a raft of stuff which is twenty, thirty years old and is ancient history; and, secondly, they referred to a form of license agreement which was not the form they would have had to enter into. They could have gotten a license agreement without the restriction which they referred to in their finding in this case.

As a matter of fact, that is shown in the record but, your Honor, there was so much of this old twenty-year-old material in here that that was overlooked, but we make offer of proof to show that—

The Court: What does your offer of proof—what would

your offer of proof be in regard to what they could have done in Australia?

Mr. Kayser: That they could have gotten a license which would have permitted the import of Zenith sets, and that they can do that today and they have been able to—

The Court: Was that a package deal involving all [103] of the patents in the pool?

Mr. Kayser: That I don't know, but that is not the issue in this—

The Court: I mean, they could have got that in Canada, too.

Mr. Kayser: Oh, no, their complaint is that they could not get a license to import.

The Court: That is right.

Mr. Kayser: That is right. They could have gotten a license to import in Australia. They could have gotten it since 1951.

The Court: All right.

Mr. Kayser: As a matter of fact, the real reason that Zenith didn't go into Australia, if they ever had any interest in the first place, is quite apparent when you examine what, again, the restrictions in tariffs and so forth were and are of the Australian Government. Mr. Wright, again, testified that up until 1957 he admitted they couldn't go in because he said the currency exchanges and so forth, like in England, but the fact of the matter is that as we show in our offer of proof, the tariff on the import of television sets and radio sets into Australia is so large that it practically doubles the price of the set. That [104] is the reason they are not interested in Australia. We show that if—Zenith's 1962 average price for a television set was $136.80 and under the tariffs in Australia, the tariff and taxes would be substantially the same amount. It would double the price of the set, and how could they compete with the local manufacturer? This may not be right, your

Honor. Maybe we should have free trade, but this is the responsibility of the Government of Australia. This is not the responsibility of Hazeltine or the Australian pools. They could come in but they can't compete.

The Court: I mean, Hazeltine won't be punished for anything that the governments of any country do.

Mr. Kayser: Now, I would like to spend just a very brief moment on the testimony of Mr. Wright and Mr. Kaplan, which I submit is not supported by the record.

They testified—there is no sense in engaging in a controversy to any great extent as to what the cases say, who is qualified and who isn't. The fact of the matter is that there was no—first, no evidence that they really [105] did have the background and the knowledge to testify. One was a lawyer, vice president and president, and the other was a financial man. Obviously, the people who might have some knowledge would have been people from Zenith Radio, Ltd. in Canada who could testify to what was happening. A distributor in England—of course, they could call nobody from Australia.

The Court: What could a Canadian have testified to that would have—

Mr. Kayser: He could testify firsthand exactly what, if anything, was happening.

The Court: I mean, what would be the basis of his testimony as to the percentage of the market that Zenith would have had?

Mr. Kayser: He certainly would know far better than Mr. Wright, who is merely drawing an analogy. He would be far better qualified than Mr. Wright to know what the Canadian potential was.

[106] The Court: What would be the basis of his knowledge?

Mr. Kayser: Well, of course, your Honor, the share of the market which you get in Canada isn't necessarily a

matter of parallelism against what you do in another country. That is the point. It should be based on the knowledge you have of local conditions. That is the best knowledge. That is the best information, not what happened in the United States in Louisiana or California or New York. The question is, what are the conditions in Quebec, what are they in Manitoba, and so forth, not in the United States. The same thing is true in England.

But, in any event, there is another very significant point as concerns the testimony of these men, and that is that there was not one bit of corroboration of any kind, there was no information as to any sales lost, there was no information as to any distributors that refused to handle their merchandise, there was just a generality that somehow they should have had the share of the market, again, [107] based on the acts prior to the release. They didn't get it and therefore they should be entitled to sixteen million dollars. And, actually, the testimony that they gave here is really an exact parallel of the testimony which was given in this Wisconsin Liquor Park and Tilford case where exactly there was the same kind of testimony and the Seventh Circuit, in holding that it didn't do the job, said:

> "This testimony has no support in the record since there is no competent evidence of loss of customers or sales and could certainly be no basis for the assessment of damages. Recovery of an alleged loss of profits cannot be had on the basis of pure guesswork and speculative evidence as to the existence and extent of such losses."

Sure, people can use their best judgment, they can use their best judgment if they are qualified to use it, but the judgment of someone who is not qualified, the judgment [108] of somebody which is directly contrary with the record as is the testimony of these men, in conflict with their own annual reports and so forth, that we submit has no

weight. But the convincing thing, as I see it here, is that the annual reports of Zenith, the information as to the fact that they couldn't have gone into England anyhow until June of 1959, the fact that they always were free to go into Australia, make it quite clear that all of this so-called proof as to fact of damage is entirely without foundation.

Now, your Honor, there is another point which—

The Court: Well, I mean, regardless of the nature of this proof that you are talking about, the trial lawyer must have known that in regard to this counterclaim there was going to be some evidence offered as to loss of profits during the damage period, and regardless of the fashion in which that proof was offered, he certainly should have been sufficiently aware to know the things which you are telling me today, that prior to 1959, regardless of cartelization, they couldn't have sold anything in Britain.

[109] Mr. Kayser: No, your Honor. Why would he know that when the only thing he was faced with was a claim of acts occurring October 18, 1961? That is the point. There was nothing in this pleading which would alert him in the slightest of that sort of evidence, or this need to combat it. That is the point. He had no notice of this, none whatsoever.

The Court: Well, I mean, even assuming your theory of this, that the damage period starts on the 16th or 18th of October, 1961.

Mr. Kayser: In 1961.

The Court: —1961, would you say that this information which you now give me, and let's take Australia, that at all times they could import into Australia, that that would not be a good response to the claim in regard to Australia?

Mr. Kayser: Yes, your Honor, and he did make that response.

The Court: He did?

Mr. Kayser: Yes, he did, yes, he did. The one thing

that he failed to do, understandably, he did not put before the Court the current license agreement, the form, the [110] whole number, the form 7 as against 7B, which does not contain this paragraph which is found objectionable in the findings, but he did put in the—

The Court: And 7B came into effect when?

Mr. Kayser: That came into effect in 1961, but 7B is not the license form which would be offered to Zenith. That is a form which is used for local assemblers, according to the record, you see. There were two forms, there would be 3, 3B—

The Court: When did Australia permit imports of American manufactured radios and televisions?

Mr. Kayser: Since 1951, is my information.

The Court: Well, wouldn't anybody, even Mr. Dodds know that some claim was going to be made for damages from Australia during some period of time prior to the trial?

Mr. Kayser: Yes, and there is in evidence the license agreements through six, which carries, I think, up to—I forget whether it is 1961 or 1959 or what. Your Honor, I recognize the fact that this 7 should have been produced as well. But the record does—

[111] The Court: Was the Court ever shown any evidence that at no time did one need special dispensation from the cartel to import into Australia?

[112] Mr. Kayser: Yes.

The Court: I was shown that? That is in the record?

Mr. Kayser: Yes, there is record which distinguishes between 6 and 6B, 7 and 7B. But 7 was not—7, your Honor, was not in Court. We must recognize that fact. We confess that it was not in Court.

The Court: Well, was 7 the one that has to do with imports?

Mr. Kayser: Yes. The point is, 7 is the current one on imports. Then there is 6, 5—

The Court: I mean, 7 is the current one starting with '51?

Mr. Kayser: '61?

The Court: —'61 or '51?

Mr. Kayser: '61. But there is in the record one which starts with 1951, which was free of restriction. It is in the record. There is 5 and 6, and then there is 5B, 6B—

The Court: Was that argued by anybody in their post-trial briefs?

[113] Mr. Kayser: Yes, I think it was, your Honor. I think it was. But I will own that number 7 was not produced. Now, there is no question about it. It was not before your Honor.

The Court: And it was available?

Mr. Kayser: It wasn't available here. It was available from Australia, and we have a copy which we attached to our offer of proof.

The Court: I mean, it was just as available to you then as it is now.

Mr. Kayser: Yes, your Honor. I don't think there can be any question about that.

The Court: All right.

Mr. Kayser: I started to make another point here. What I wanted to do is show a rather interesting analogy between the conduct of this case and something which happened in the Zenith-RCA case which Mr. McConnell talked about so much, and which I would now like to refer to a little bit myself. And that is that in that case, originally in the amendment and supplement to the counter-claim, which is here in this case as plaintiff's Exhibit 43, Zenith in [114] paragraph 13 made certain claims for money damages against RCA, GE, and Western Electric—

The Court: Are you getting down to the five and a half per cent settlement? Is that what you are leading up to?

Mr. Kayser: No. I'm getting to a certain course of con-

duct which was involved in that case which appears here, which I think is very significant.

In that case, they asked for the period from January 14, '47 to January 1, '56. They asked for loss of profits from the sale of radio sets in England of roughly $1,460,000; they asked for loss of profits from the sale of radio sets in Australia for roughly $3,300,000. And the trebled claim of those two items came to over fourteen million dollars.

Now, when Mr. Wright got on the stand in this case—

The Court: I mean, were they able to import to England prior to '59 radios?

Mr. Kayser: No, sir. That's my point.

The Court: All right.

[115] Mr. Kayser: Mr. Wright, when he got on the stand in this case and explained so gleefully the ten million dollar settlement, explained that this was solely for Canada, because he said that during depositions in the Zenith-RCA case it had been determined that because, I believe he said, of currency restrictions, no radio or television sets could be imported into England or Australia regardless of the pool. He said that accordingly they then, in the settlement, claimed money just on account of interference in Canada.

But the interesting thing, your Honor, is this, and that is that if Mr. Wright testified correctly, then Zenith made these claims against GE, RCA and Westinghouse for over fourteen million dollars without even having checked to see whether or not they could have sold their sets in England or Australia. They came in with a claim for fourteen million dollars and they didn't even check the facts or, on the other hand—

The Court: Who was it that developed this in the trial of the RCA case?

[116] Mr. Kayser: That apparently was developed on deposition. Mr. Wright said it came out on deposition.

The Court: I assume it was a deposition taken by counsel for the defendants.

Mr. Kayser: I assume—your Honor, here they made this claim for fourteen million dollars plus, and they hadn't even bothered to see if they had a claim or, on the other hand, if they knew about these restrictions—well, that would be a great deal worse. But now the analogy—

The Court: The ad damnums don't mean much, you know. We get claims for $100,000 and we settle them in the back room for $1,500.

Mr. Kayser: Yes. But, your Honor, I submit you shouldn't ask an ad damnum of five cents if you know you don't have a lawsuit, or you shouldn't make a claim for a lawsuit if you haven't bothered to check—even to your own satisfaction, you haven't checked the facts enough to find out whether you have any basis to ask for anything.

Now, the relevancy of that is this: It's bad enough, your Honor, for the giant Zenith here, first in television [117] and second in radio, and so forth, to tussle in the forest with RCA and GE and Western Electric, who are other large sized corporations. But when they do what they have done here, your Honor, I think really—I say in all sincerity, I think that for them to make this claim here, to make these claims, and to have done it by the back door without openly filing a pleading, gradually in the process of the trial to make this switch—maybe counsel should have caught it, and maybe he shouldn't, but to make this switch and try to get this kind of recovery when they don't have any basis whatsoever, I say that this is the use of the process of this Court for economic warfare. That is what it is, and I say that I don't—

The Court: Who filed the lawsuit?

Mr. Kayser: We filed a lawsuit for patent infringement, yes, and they filed a counter-claim, and limited counter-claim antitrust. And then they suddenly shifted into the other lawsuit.

But I think this is a very serious matter, and I think that

the propriety and the consequences of this kind of activ-
[118] ity really, really should be considered by Zenith management, because this is, your Honor—this is nothing but economic warfare. Why Zenith wants to do this, to this small corporation — maybe their patents are valid and maybe they aren't, but why this kind of activity should go on I don't know. I do not think it is justified. I do not think it is equity.

Now, your Honor, before we get to the subject of the—

The Court: I think maybe if we are getting to a new subject, we ought to recess for the day and start fresh with a new subject.

Mr. Kayser: Surely.

The Court: And this seems to be a good breaking point, in view of the fact that you say you are getting to a new subject. We will stand adjourned until 10:00 o'clock tomorrow morning.

(Whereupon, the hearing in the above-entitled matter was adjourned to 10:00 o'clock a.m. of the following day, March 31, 1965.)

[119] * * (Caption—59-C-1847) * *

Before Judge Austin,
Wednesday, March 31, 1965,
10:00 o'clock a.m.

Hearing resumed pursuant to adjournment.

Present:

Same as before.

And thereupon the following further proceedings were had herein:

[120] The Clerk: 59 C 1847, Hazeltine v. Zenith.

Mr. Kayser: Good morning, your Honor.

The Court: Good morning.

Let me say, for the benefit of counsel, that we will go until 12:30 and start at 2:00, but at 3:00 o'clock there is a judges' meeting. This is for the purpose of determining your time for the day. At 3:00 o'clock there is a judges' meeting, so that the afternoon session will conclude earlier than normal, but you are not limited to today, if you don't want to be. I thought I would give you what the schedule is for today.

All right. Will you proceed.

Mr. Kayser: Your Honor, there has been a development in this case overnight.

McDermott, Will & Emery is general counsel for Hazeltine Research, and accordingly we requested them, in connection with our work here, to check with counsel overseas to find out what the facts were on the matters of tariffs, taxes, embargoes, and things of that type.

The Court: In regard to England and Australia?

Mr. Kayser: And Australia.

And, your Honor, the firm that they have consulted [121] and been consulting in Australia is the firm of Blake & Riggall in Melbourne, one of the leading firms in Australia.

Mr. Charles Hussey of the McDermott firm received a phone call last night, 12:30, as I understand it, reporting on the existence of an embargo in Australia against the importation of radio and television sets until February, 1960.

Now, we, of course, have not had an opportunity to further verify this—

The Court: Well, I mean, there is a—

Mr. Kayser: There is a proviso that if sets were inported during the period of July 1, 1950, to June 30, 1951, that then there could be further imports prior to February 1960, but, your Honor, in this case it is quite apparent that Zenith does not come under this exeception, because Mr. Wright testified that in the RCA-Zenith case it had been determined that up to that time they could not import. That time was within the period referred to in this phone call. So they knew in 1957 that they could not import, that they were not under this exception. They must have known it since that time and yet we find, your Honor, that in [122] their demands in this case they have asked for alleged loss of profits for the year 1959 based on 1.562 per cent of the Australian television market and 1.284 per cent of the Australian radio market for the year 1959.

Now, your Honor, we did not learn this earlier. It did not—we have not been able to verify it. We believe it to be the fact, but I may say, I may remind your Honor, that it is Zenith who has made the claim here. It is Zenith who should not be before this court asking for damages until at least it has ascertained the facts adequately so that it has at least a basis for its claim.

The Court: Yesterday, your position was, in regard to Australia, that there never was a ban on importation.

Mr. Kayser: I said, your Honor, that there was not a —since 1951 there had not been a ban on importation so far as—

The Court: As the cartel or pool.

Mr. Kayser: Yes, your Honor.

And, of course, under this regulation, if there were companies who had been importing from the period of '50 [123] to '51 they could continue to import, but Zenith is not one of those.

The Court: All right.

[124] Mr. Kayser: So I submit, your Honor, that we have here evidence which upon confirmation would make it clear that a portion, at least of the Australian damage claim, could under no circumstances stand.

Now, your Honor asked me yesterday a number of questions—

The Court: You have been reading the transcript.

Mr. Kayser: Well, in part, your Honor, and I also have been thinking things over as you might expect since 4:30. I would like to deal very briefly with a couple of them before I come to my next point which has to do with the statute of limitations.

The Court: You may proceed.

Mr. Kayser: Your Honor asked, as I understand it, that even assuming this 1957 settlement, which we offered to prove, and even assuming that the bar of that applies to our client here, why can't Zenith take the position that except for the acts of the pool, it could have between the September '57 period and May of 1959 built up its markets [125] through the theoretical—

The Court: I remember the questions.

Mr. Kayser: Yes, yes. Now, your Honor, the answer to this question and the issue here is, of course, a question of fact. This is not a question of a legal theory or legal abstraction. The question is whether as a matter of fact

Zenith has any basis for saying that except for the alleged acts of the pool it could have, between September, '57 and May, '59, have broke up, for example, to a 15.6% on television in Canada.

Now, in considering that, it must be remembered that the testimony of Mr. Wright as to what had occurred in the United States where, for example, he said Zenith has 15.6% of the television market—that that testimony of his was based on the fact also that Zenith had been producing and selling television sets in the United States since roughly 1948. In other words, this 15.6% of the American market represents the result of some 11 years of tilling the soil, of marketing, of advertising, improving, and so on, and so on.

[126] And that in the case of radio, where apparently the testimony is that by May 22, '59, Zenith had roughly 13%, a little less, of the American market, this represented the result of marketing, sales, promotion, and so forth since 1923, way way back in the distant future, almost four decades ago.

So Zenith in the United States came to the point where it was on the basis of over thirty years in radio and on the basis of over a decade in television as of May, '59.

So, then, the question is, would there be any justification, is there any basis in fact for supposing that Zenith could do a comparable job in Canada between September, 1957 and May of 1959, but for the claimed interference of the pools, or whether they could do a comparable job in England and a comparable job in Australia. Is there any baisis for believing—

[127] The Court: Well, of course it is your position, as I understand it, in regard to England, that the government barred any importation prior to June of '59.

Mr. Kayser: Yes, yes.

The Court: So stay with Canada where magazines and

advertisement isn't barred at the border, and does flow across and is a source of sales, I imagine.

Mr. Kayser: Yes. I think, really, we can forget about England and we can forget now about Australia, because it is clear on the record that there was no basis for this contention, because the act of the government in both countries is the thing that prevented them from getting to this percentage of the market by May, 1959. It was the government that kept them from doing anything. So I think Canada is the proper testing ground for this proposition.

Now, in the case of Canada, your Honor, looking at the facts now, not at some theory of what you could do between September of '57 and May, '59, we find first from Zenith's own annual report for 1957 that it was then that they started to make their plans; they started to locate distributors, and find out and do all the things that Zenith had [128] to do in the United States, starting with '48 in television, starting in '23 with radio.

They started in late '57 to get together and distributor organization and so forth. And by their own admission, in their findings of fact, it was not until late in 1958 that Zenith actually got to the point in Canada—this is Finding 30, your Honor—got to the point in Canada where Zenith began late in 1958 to export to and sell in Canada its radio and television products through its Canadian subsidiary. In other words, your Honor, not as a matter of theory, but as a matter of fact, after the '57 settlement, they did not get started in Canada—the normal routine of getting started took them until late 1958.

And we find then—we find then that according to their testimony, by May 22, 1959, or June 1 I think is the date they chose, they had acquired 2.6 per cent of the television business in Canada. And their annual reports show that with this late '58 start, they proceeded well. Their sales

were encouraging and they were happy; they were outstripping the industry trend and all that sort of thing [129] until '62, when the tariff was raised and their sales were affected.

So we say that it is clear, not on the basis of some legal theory—it's clear on the facts that Zenith is in no position to claim that but for the acts of any pools between September, '57, and May, '59—but for those acts they would have had 15.6 per cent of the television market and these other percentages.

In Canada, their performance was all they could expect from that starting point.

In the other two countries, the evidence is that the law interfered with their beginning at all, and they certainly cannot expect to collect damages from Hazeltine because the governments of those countries got in their way.

Now, another question which your Honor put to me was, assuming that these releases and assuming that Hazeltine has the benefit of them, is it not true that the continued existence of the pools after 1957 may be the basis of a damage claim. And I think the answer to that must be, your Honor, that the mere continued existence of the pool—that fact itself is not a basis for a damage claim. It is not [130] the basis for a damage claim whether or not the pool contains any restrictions. It is not the basis for a damage claim even though it is said that the pools took—

[131] Mr. McDougall: I beg your pardon, Mr. Kayser. I want to apologize for being late, your Honor. I have been tied up in Judge Will's court until now. I just got free.

The Court: We just heard about some law firm they had in England. All right.

Mr. Kayser: As I was saying, that the existence of the conspiracy does not go to the basis of release, even though

it was shown that the pool took action against Zenith. A claim for damages—

The Court: You will explain why, Mr. Kayser.

Mr. Kayser: Yes. Because, your Honor, a claim for damages can exist only if the plaintiff proves that he was in fact damaged. The statute gives release only so far as money recovery is concerned on the basis of damage.

For example, let us assume that someone is driving recklessly on the highway. He shouldn't be doing that. He can be criminally liable. He can be sent to jail for it. But so far as concerns the bystander, or so far as concerns another car, a driver of another vehicle, even though [132] these things may be wrong, he has no cause of action unless he can show that he was hurt.

The Court: I agree.

Mr. Kayser: For example, let's suppose that the cars even collide. But if the second vehicle has not been damaged, and if the second driver has not been damaged, even though there is a fact of collision, there is no claim for recovery unless damage is shown.

The Court: I agree.

Mr. Kayser: And that is exactly what we have here in the area of treble damage claims under the Sherman Act for antitrust.

Now, your Honor asked another question; namely, why wasn't the testimony of Messrs. Wright and Kaplan on this damage question—why don't we feel that that was proper and adequate.

Now, your Honor, on the question of damage there are two aspects, and this is very very clear in the law as it has developed. One aspect is, first, that the plaintiff must prove the fact of damage; namely, as in this automobile case, he must prove that his fender, so to speak, was in fact dented. And then, secondly, once he proves that [133] his fender was dented, then we get to the question of the

extent of damage, how much would it cost to fix it. But he must first prove that damage did in fact occur.

The Court: If you are going to stick with your PI case, why, there is also another factor—that any damage that did occur must be proximately caused by the person charged with causing the damage.

Mr. Kayser: Yes. And if a third party runs into the car, or in this case if the government of Australia runs into the car, the driver of the first car, reckless or not, is not responsible for what the third did or what the government of Australia did. And that is exactly the point we want to make.

And further, your Honor, when it comes to the question as to whether or not the fact of damage existed, this again cannot be a matter of speculation. Somebody can't be sitting in an office and not have knowledge of the facts and be the man who says, "Yes, there was an accident and A's car struck B's car."

[134] Sure, he can get on the stand and testify, but he is not the man who should be testifying. The man who should testify is the man who was at the scene, the man who has personal knowledge.

The Court: And in this case that would be who?

Mr. Kayser: I would say, your Honor, so far as concerns Zenith's proof in this case, that the logical people they should have called would be their export manager. Their annual report shows, for example, that in 1959 they set up a Zenith Sales Corporation which was in charge of both domestic and foreign sales.

Now, I believe their annual reports shows also that they have a man who is specifically in charge of export matters.

The Court: Wouldn't the sales depend upon the ability to freely export? And it is their contention, as I understand it, that they weren't permitted to freely export; so his opinion in regard to that, because of his being called

the export manager, I fail to see that that qualifies him under the alleged circumstances of this case.

Mr. Kayser: Certainly he would have more knowl-
[135] edge than someone not directly concerned.

But above and beyond that, your Honor, even the export manager testifying purely as a matter of speculation, of estimate, with nothing more than that, would not have a standing to prove this very serious matter here of creating liability.

The cases have said, your Honor, just as the Seventh Circuit said in the Park and Tilford case, that the testimony of the executive saying that but for these activities he could have doubled his profits, they said that won't do the job. There is absolutely no corroboration, there is no proof of any business loss, there is no question of any distributors lost. There is just his unqualified, unsupported statement. And the cases have said—well, here, I would like to read from the leading case in our memo here, the Story Parchment cases. It says:

> "There is a clear distinction between the measure of damage necessary to establish the fact that petitioner has sustained some damage and the measure of proof necessary to fix the amount."

Mr. Rathburn points out that in my quotation I [136] should have read correctly:

> "between the measure of proof necessary to establish the fact that petitioner had sustained some damage and the measure of proof necessary to fix the amount."

And the court says that when it comes to the matter of proving the fact of damage, this must be established by certain proof, and it is clear that although under some circumstances there is a liberality—

[137] The Court: How can there be certain proof under the facts of this case?

Mr. Kayser: How can there be certain proof?

The Court: Yes.

Mr. Kayser: There could be very easily certain proof if there is any, your Honor. That could be, for example, bringing in witnesses from Canada to testify, for example, that they had failed and refused to import a Zenith because this pool had said to them, "If you do, you will get sued."

The Court: Can't one draw an inference of that based upon the proof that was adduced in the case?

Mr. Kayser: No, your Honor, I do not see how that can be.

The courts have said that in this area where the—obviously the chance for speculation is so great, that there should be some exact, precise evidence.

After all, the plaintiff here is not engaging—should not be engaging in legal theorization but—

[138] The Court: Let's assume that they brought in one of these dealers who was threatened, who got a notice and was told that if he continued to sell Zenith's, why, he wouldn't get any Canadian products, and that as a result of that he didn't import any more Zenith products; on the basis of that, how would be come up with any figures on the percentage of the market that they might have had? How would that be helpful? It certainly might establish that he didn't order any more because of the warnings he received, but in regard to the figures and the damage question, how would that be helpful?

Mr. Kayser: Well, it would be some evidence as to the fact that some injury had occurred.

The Court: Is it your position that there is no proof of injury in regard to the Canadian market?

Mr. Kayser: Yes, your Honor, that is my position and their own records—

The Court: I did not realize that anybody would adopt that position in the face of the—

Mr. Kayser: Your Honor, the record is clear that after the settlement and by their own annual reports and by their own admissions their business did as well [139] as they could possibly expect. There isn't one scintilla of evidence to the contrary.

If your Honor, again, if he refers to the share of the market which they said they should have had and did not have, your Honor, that will, again—that is barred by the release. That then again comes under the point of statute of limitations, which I will come to in a minute.

The Court: All right.

Mr. Kayser: And so during the four year period in question there is no basis for any damage claim whatsoever. That is our position.

The Court: All right.

Mr. Kayser: This is as a matter of fact, your Honor. not a matter of legal theory. These are the facts.

The Court: But there could have been, if they had brought in a dealer who said, "I was going to sell Zeniths until I got threatened and then I didn't," that would have rectified the opening or the void that you claim exists.

Mr. Kayser: Well, that might be an overt act, but they would still have to prove, as in the case of the [140] car that struck the other, they would still have to prove damage. They might, to the extent of the profits that they could have made off of that dealer, but they still have to prove—in that case they would have to prove the extent of the damage.

Now, your Honor, this was their case. This was their theory. Your Honor asks what would happen if they had done that. This is their theory and their case and they did not do it, your Honor. Now, this is the record here, they didn't do it.

The Court: All right.

[141] Mr. Kayser: We have had a lot of ancient history, but we have had no history within this four years.

Now, on this other question, and you get past the question of the fact of the damage, as to the extent of the damage, the courts have been more liberal, particularly in those cases where it is said it was the act of the defendant which prevented the plaintiff from being able to bring in more certain proof. They say, in other words, when the defendant prevented the plaintiff from building up the market, or from creating facts or having facts which—

The Court: Isn't that the position of Zenith in this case?

Mr. Kayser: No, your Honor, it is not.

The Court: It isn't?

Mr. Kayser: That may be their contention, but it is not in fact their position. I mean, it is not the fact.

The courts have said that there will be a liberality—

The Court: Don't they say but for the pool we [142] would have been able to have obtained this per cent of the market, and by virtue of the pools agreement we are unable to supply any better proof than what we have. Isn't that—

Mr. Kayser: They are unable to supply any better proof than they have? Your Honor, they could supply a great deal more proof than they have and much, much better. There are a great many things that they could supply.

The Court: Don't tip them off in case we—

Mr. Kayser: They are aware of this, your Honor, they are aware of this.

The Court: All right.

Mr. Kayser: All they have done is that they have just put on Mr. Wright who gave a little general background and then guessed on Canada and England. He admitted he was guessing on England. And Mr. Kaplan got on the stand and more or less contradicted Mr. Wright on Eng-

land. And Australia, they just picked a figure out of the air.

Now, the fact of this type of situation does not excuse a party from bringing in the best evidence [143] that he can. It does not permit him to just speculate as he sees fit.

The cases point out that when there is difficulty in proving these things, then estimates may be used, but they should be the best estimates available, possible, and they should be based on all the evidence available under the circumstances. It should be based on the evidence available under the circumstances.

The Court: It is your contention that there was other evidence available?

Mr. Kayser: Yes, there were a great many things that could be considered which obviously were not considered. These men weren't qualified to consider it, didn't even try to. These are matters of the conditions in the market in dispute; for example, prices, relative costs and so forth. These were the men who were the authors of this screw driver story in England. Had they investigated the market conditions, had they investigated to see, for example, the kind of set that was needed—on the question of prices, [144] as we shall show later, they paid no attention, for example, in England to the question of prices

On the question of tariffs, for example, it is obvious that they paid no attention. Mr. Wright, for example, testified that he thought the Australian tariff was lower than twenty or thirty per cent, and as we show in our offer of proof the tariff is roughly—would be a hundred per cent.

In other words, they gave these estimates without actually any consideration of the market conditions in each country.

Your Honor, this should not be a question of theorization and speculation. This is the testimony than can end up in these tens of millions of dollars of damage. This

should be the absolute best, most thorough evidence based on the most thorough exploration possible, including such matters as market conditions, cost of conversion of sets, tariffs, embargos and so forth.

I submit that they should not come into the court and say, "Well, since the cases say that we can speculate, let's speculate." That is no basis for a judgment.

[145] The Court: Well, isn't there an obligation on the part of counsel to prepare for cross-examination such witnesses, and if they are as far off base as you say that Mr. Wright was in regard to tariffs and other matters confront him on cross-examination and perhaps destroy his testimony even as far as direct examination is concerned? Was that done?

Mr. Kayser: I think, your Honor, that it could have possibly been done much more exhaustively than it was.

But, your Honor, a lawsuit is not entirely, as the cases say, a contest of wits and, yes, there is an obligation on the part of the defendant—I mean the opposing party to cross-examine and so forth, but there is also an obligation on the part of the proposing party to see to it that he tells the facts, that he tells the truth, that he does not unconsciously exaggerate, and so on this, this is a two-way street, your Honor, this obligation of counsel on the parties. It is not a matter of "What can I get away with and not get caught?" There is an ethical, there is a legal and there is a moral obligation, if you please, that [146] both sides of a lawsuit—

The Court: Well, there is, you know—you haven't used the word and, of course, I won't make you use it—but underlying what you are saying is what is said so frequently in appeals in criminal cases, that they are where they are by virtue of incompetence of counsel.

Now, there a person's liberty is involved, and what do

the courts say in regard to this plea of incompetency of counsel?

They say, first, was he counsel of your choice rather than appointed counsel? And if he was, the courts say, in regard to keeping men incarcerated and depriving them of their liberty, that unless the trial conducted by counsel of the prisoner's choice was such a farce, such a fraud that justice would be horrified by the result, that since you are represented by counsel of your choice, why, agreed that he might not be the greatest in the world, but he was your lawyer and you picked him out. You are going to have to remain incarcerated for the balance of your term.

Now, how do we get around that analogy in this case? [147] Mr. Kayser: Your Honor, I think that in any lawsuit, and certainly there is a question here when we are moving to reopen—

The Court: They don't say to these prisoners, "Perhaps you could have had a better trial and might not have been incarcerated if your lawyer was top-drawer, but he did not do an intolerable job."

Mr. Kayser: Your Honor, what would the Appellate Court say if it could be established that there was some evidence in the case which was not true evidence and the prisoner's lawyer was not smart enough to catch it.

The Court: Well, it depends on whether it wasn't available to him at the time that it happened. You get down to your writs in the nature of a writ of error corum nobis where newly-discovered evidence may bring about a new trial on the basis that this knowledge was unknown to the defendant and to his counsel and could not have been known to him and for that reason, since it was not known and could not have been known, they are going to be given an opportunity to present it. But if this was available, and certainly in regard to whether you could [148] or couldn't import into Australia was available—

Mr. Kayser: You mean whether Zenith could or could not import?

The Court: Whether anybody could or could not import, based upon government blockades rather than cartel blockades, that certainly was available and perhaps should have been presented.

Mr. Kayser: By Zenith. Zenith has an obligation here, your Honor.

The Court: Well, I mean, I don't know that there is any obligation for anybody to try both sides of a lawsuit.

Mr. Kayser: He has got an obligation to try his own side honestly.

The Court: Do I have any evidence that they were aware of the fact, which you say is a fact, that—

Mr. Kayser: Yes, sir, we do, your Honor, and it is in this record. Mr. Wright admitted that in 1957 they knew they couldn't import into Australia. That is in this record.

The Court: Did he say that that could continue to be the situation in regard to any of the damage [149] period?

Mr. Kayser: Your Honor, isn't it reasonable to assume that they should check to see whether this had been removed, the restriction?

The Court: Don't we put any obligation on the adversary proceeding on the other side to prepare their lawsuit?

[150] Mr. Kayser: Yes, we do, your Honor. But we also put obligation on the part of the proposing party.

The Court: You have been able to find this out?

Mr. Kayser: Your Honor, we found this out in seven weeks, yes.

The Court: And I think this lawsuit was pending four years before it was tried.

Mr. Kayser: That's right. And Zenith had been in radio and television for thirty-five, forty years.

The Court: Well, let's go on with what you have to say.

Mr. Kayser: All right. Your Honor, I would, before I go to the statutes of limitations point I was coming to—I would like to comment, if I may, for a moment on your comment on the idea that this is not newly discovered evidence or evidence which could not have been discovered by both sides.

The Court: Yes.

Mr. Kayser: And the fact of the matter is that, your Honor, we are not before this Court on the basis of [151] a request to set aside a judgment, but rather to request this Court to exercise a discretion not to enter the judgment. And we are here on the basis—

The Court: And that is a distinction of some consequence?

Mr. Kayser: This is a distinction which the courts have recognized, your Honor; yes, they have. They have said that the court's power is not limited. This is in our memorandum of the cases on page 6 and following. They have said that it is clear that the court's power is not limited to situations involving newly discovered evidence.

They have said that the court has broad discretion to consider the individual circumstances of each case in order to do what will most advance the interests of justice.

They have said that a lawsuit is not a battle or a contest of wits; it is a fair struggle for a just decision.

They have said that the case may be reopened when surprise results from a change of theory, or when a material [152] issue has not previously been raised or adequately covered at the trial, or where for some reason important evidence has not been introduced at the trial.

The courts have also said, your Honor, that when there has been a change of position resulting in surprise, that even though opposing counsel—

The Court: We are on notice pleading here in the Federal Court and not common law pleading.

Mr. Kayser: Sir?

The Court: I say, we are on notice pleading here in the Federal Court, not common law.

Mr. Kayser: That's right, and we had no notice of this cause of action, your Honor. That is the point.

The Court: I mean, it may be due to somebody's inability to understand the English language, but to me it appears you have notice based on what I read to you yesterday.

Mr. Kayser: Well, your Honor, the courts have said that when the issues—the cause of action has not been [153] delineated, then even though opposing counsel should have objected, that if there is major prejudice resulting, that his client will not be held to suffer under those circumstances.

Now, I would like to go back, if I may—

The Court: Any direction you want.

Mr. Kayser: Thank you, sir—on this question of the statute of limitations.

Now, we have in our motion and our memorandum pointed out that under this theory of action which is in Zenith's findings, the fact is that their claim is barred by the statute of limitations on two grounds.

[154] The first ground—and it was the second one in our motion, but I will mention it first—the first ground is that to the extent that they claim loss of profit by reason of the fact that but for the pools they could have built up to these percentages shown by May 22, 1959, that that claim for damage is barred because the acts on which they rely occurred more than four years before the filing of the suit, and you cannot claim damage resulting from acts which occurred more than four years ago even though the damage may continue into the four-year period. The acts themselves must have taken place within the four-year period.

The Court: To put it simply, is it your position that there must have been an overt act during the period from May 22, 1959, to May 22, 1963? Is that your position?

Mr. Kayser: Yes, that is our position.

The Court: And the fact that there was a continuing conspiracy regarding which there were overt acts shown prior to May 22, 1959, is of no consequence?

Mr. Kayser: This is of no consequence.

[155] The Court: All right. Just so I get your position.

Mr. Kayser: Yes.

And the second part of this is that we say, your Honor, that there is nothing—there is no evidence in this record to show that any overt act causing the damage occurred within the four year period.

The Court: I think I have your position. We understand each other.

Mr. Kayser: Yes.

Now I would like to turn, finally, to Zenith's Exhibit 218.

The Court: It was on the floor the last time I saw it.

Mr. Kayser: Your Honor, I want to apologize for that. That was not planned. It was completely spontaneous, and I thank you for not taking me to task for it.

The Court: I just want to help you find it.

Mr. Kayser: It expressed my feelings.

The Court: I could tell from the brief that you didn't have much respect for it.

Mr. Kayser: This was not a staged thing. This just [156] came out. This was the way I felt about this exhibit.

Their claim on damage is really—this is a photostat, but this really—this group of papers is it.

As I said, we tried to figure this thing out, and I can understand why Mr. Dodds was somewhat flabbergasted, because we decided after considerable effort that we needed the help of some accountants. And if your Honor has or will have an opportunity to read the Ernst & Ernst report—

The Court: I have had it.

Mr. Kayser: They have some general characterizations of the thing. They say on page 22:

> "Taking the Zenith data in its entirety, it can be concluded that Zenith's employees did not have time to properly prepare the data underlying the cost aspects of the claim. It is highly doubtful that the general approach used in the claim or in this exhibit would be deemed acceptable by the Zenith management if data were assembled on which basic internal policies such [157] as producing new lines, and so forth, were involved."

Now, I am going to get to some specific shortcomings, but your Honor, this really is a very curious thing, I think, that we have here this claim which can result in over forty-eight million dollars. And this document was gotten together so hurriedly that it wasn't even typed.

Now, I recognize, your Honor, that the fact of typing of a document doesn't necessarily lend any weight to it. But the fact that these are just these longhand scrawls—and I can't even read some of the headings without help—this is a pretty clear indication that this was not a thorough, well-thought-out document and, frankly, I would be curious as to just how long it took to get this together.

[158] The Court: I would say that the proper time to make that inquiry is on cross-examination.

Mr. Kayser: Yes, yes. I agree, it would have been much better then. But let's consider some of the things that are in this document to see whether or not counsel, having been derelict or not—whether or not a judgment could properly be entered on the basis of this document.

Now, your Honor may recall that this document was primarily a putting together of figures as concerns Canada. And they used some cost figures involving the production of radio and television sets, and they used some sales prices

which they had had on sales of television sets in Canada. And between the cost and the sales price, that was the margin of profit. There is little—a few peculiar things about the cost figures. I will get to that later.

Well, in any event, when they took this thing over, or transposed this thing for the English market on which over nine million dollars or over half of the claim is based, they didn't even bother to use the English sales prices which were right in their own Exhibit, their Exhibit 216. [159] They didn't even bother to use those, even though these are English government figures. And even though those figures are lower, they didn't even bother to use their own export prices.

What they did, they just blandly went ahead and used their Canadian prices and the same margin of profit, and transposed it to their theoretical share of the English market, and they came out with the contention that if they had been allowed to do these things in England during these four years, they would have made nine million dollars, roughly, profits. That is the basis for the nine million dollars single, twenty-seven million dollars plus treble.

But the fact of the matter is, your Honor, that if they had been used the average English prices that the government statistics of England showed in their own Exhibit 216, the result would have been a loss, not profits of nine million dollars. The figure shows that if they had been exporting as they say during those four years, they would have [160] lost—they would have had a deficit of eleven million dollars. So their own figures—

The Court: I mean, it is your theory that they couldn't have sold Zeniths for any more than English sets were bringing?

Mr. Kayser: They certainly couldn't have sold them for so much more appreciably that an eleven million dollar loss would be a nine million dollar profit. I realize that

Zenith is the royalty of television and radio. I recognize their advertising but, your Honor—

The Court: I mean, they do sell at higher prices in this country than sets—

Mr. Kayser: Sure, sure. But, your Honor, we are dealing with reality. Sure, Zenith demands a premium; it does in this country, but it doesn't demand such a premium that an eleven million dollar loss would be a nine million dollar profit, your Honor. This is just completely totally devoid of all reality.

The Court: Is this eleven million dollar loss based upon selling it at the same price English sets were being sold for?

Mr. Kayser: Yes, yes.

[161] The Court: You don't think that is realistic either, do you?

Mr. Kayser: It's not realistic. As a matter of fact, all that Ernst & Ernst indicates is that on the basis of those English figures, that would be the approximate difference. But, your Honor, how can we ignore—how can we ignore a twenty million dollar difference? How can we say, well, the Zenith set would just automatically sell for that much more? And if it would, is there any proof of it? Is there any attempt to show that sets of this quality would sell for this fantastically higher price than the English market commands today? This would be sheer speculation, your Honor.

But the one thing that is not speculation is that using their Canadian figures, and the English average price, there is this enormous—absolutely enormous descrepancy.

[162] Now, this is one of the aspects of this Exhibit 218.

Actually, this suggests that the exhibit was gotton together so hastily that they just, because of a lack of time, didn't even bother to decide what the English situation would be.

And further, your Honor, in determining this spread, this nine million dollar profit and so forth, they didn't take any account at all of the tariff and taxes in England which, fine as the Zenith set might be, would further have raised the price sky high over the English set.

Now, to suggest that Zenith, with all its reputation and all—

The Court: I mean, there is no consideration of tariffs in this compilation?

Mr. Kayser: No, sir, not in the consideration. Oh, they talked about tariffs in talking about their share of the market. But in considering what the set would have to sell for in England, they did not consider it one whit.

The Court: I know that tariffs were certainly discussed, because that would be the first thing that would appeal to me.

[163] Mr. Kayser: It should be, it should be. And they talked about, on the stand—they talked about, well, we will get less of the English market because we understand they have got tariffs. But your Honor, have more than a share of the market aspect. They have a price aspect. Somebody has to pay them. The consumer does.

In this country, could a Zenith—does a Zenith set sell for twice as much as a comparable set? It does not, your Honor. And they would also—

The Court: Of course, they may resent the fact that you say that theirs is comparable, that they get—

Mr. Kayser: I know, I know. I'm not suggesting that they don't have a good set. I have one of my own, but that's nothing to do with this lawsuit.

The Court: That's right.

Mr. Kayser: I think we are talking about two different standards of conduct here. And the standard of conduct here is not what it should be.

Now, another thing that has occurred in this Exhibit 218

has to do with a device which has inflated the margin of profit considerably.

[164] Of course, how much profit there is in a set can depend on a number of factors. One is, what do you sell it for and what does it cost you. There is a question of a spread.

Well, Zenith—this Exhibit 218 came up with some profit figures, I believe—and this is rough; I believe it was in television, in 1960—this is just an illustration. They came up with a theoretical profit on the Canadian operation of around 4 per cent.

But then what their accountant proceeded to do is to say, well, a lot of these costs that are involved in getting down to 4 per cent are so-called fixed costs which wouldn't appear or be repeated if we increased our production. And, therefore, I will strike all those; I will compress the costs and, therefore, I will increase the profit.

And what he did by that means in one year, for example, he practically quadrupled the profit by removing costs from consideration, saying that they are fixed and that they should not be considered.

Now, the accountants have said—

The Court: Well, the costs of the plant are the [165] same, whether they push out 100,000 sets a day or 400,000 sets a day. The cost of the building itself doesn't change. It may take more labor, it may take more material, but there are some costs that don't expand, aren't there?

[166] Mr. Kayser: Well, you see, your Honor, the problem is this, and this is something I think we have to remember all the way through.

When we are dealing with facts, we should not theorize. We should determine what the facts are. It is not a matter of theory what might or might not happen. The question is, what did happen. And the accountants, as they show in their report, they have analyzed the exhibit. They have

also analyzed some Zenith annual reports. And they have concluded—this is Ernst & Ernst, one of the finest accounting firms in this country. I venture nobody will question that. They have concluded that the treatment of many of these items as fixed costs to be removed is not factually correct. It is not justified; it is not verified by the facts which are presented, which are presented in the exhibit and in the Zenith figures.

This, your Honor—this is not a matter of theory of how many sets you can build in a factory and what is more cost or not more cost. The question is, what is the fact.

Now, Ernst & Ernst—

The Court: But if you haven't done it, why, it [167] has to be theory.

Mr. Kayser: Sir?

The Court: I say, if you haven't done it, then it has to be theory. I mean, if you haven't put out another 100,000—

Mr. Kayser: No, your Honor. It does not have to be theory when you are doing it, when you are reaching your conclusions on the alleged basis of your own records and your own experience. Then the conclusions you reach should be consistent with your own record—

The Court: The facts, as I understand it, are things that have already occurred. And if you are contemplating something that hasn't occurred, it has to be theory. Maybe your theory is good or bad, but it has to be theory. It can't be a fact.

Mr. Kayser: Yes, your Honor. But when what you say you are doing is based on facts which have occurred, then what you say should be consistent and verified by those facts and not be contrary to them. I think we are entitled to that premise.

The Court: All right.

Mr. Kayser: Now, Ernst & Ernst have not pretended to be able to come to a final answer on a great many

[168] of these questions. They say that they would need to do a great deal more studying, get a great deal more information as Zenith should have had before it presented the exhibit. But they have pointed out to a number of very glaring defects, to a number of very glaring questions.

Now, according to their best estimate, that the way the Zenith accountants have played with this fixed cost aspect, that out of the total of $16,000,000 damages in the three countries, roughly ten million of the sixteen result from the fact they excluded as fixed cost items which should not have been excluded, items which would have decreased the profit.

They indicate, in other words—and this again is tentative because they don't have the underlying data—

The Court: Do they set forth what those items are?

Mr. Kayser: Yes, they do. And I am not an accountant. I am not a television expert. But, yes, they are in this report. So according to their best—

The Court: I mean, if you don't understand them, [169] you don't expect me to, do you, because I'm not an accountant either.

Mr. Kayser: Yes, your Honor. This is something which would need to be enlarged on by evidence, testimony.

The Court: I'm just talking about trying to understand what is before us, not—

Mr. Kayser: Well, the basic thing before us is the fact that they have treated and excluded as fixed costs items which are not in fact fixed costs if tested out against Zenith's own procedures and experience.

[170] So, in other words, of the sixteen million dollars claim, roughly ten of it could well be excluded right there. And that alone would drop it from sixteen to six, to say nothing of this English story which destroys—which takes a nine million dollar profit when, in fact, it ought to be an eleven million dollar loss.

Now, another thing that Zenith did in this Exhibit 218—you will recall that they decided their share of the market in Canada, for example, was on the basis of what they said their share of the U. S. market was. They said that the Canada market should be the same. And in deciding that they have 15.6 per cent of the American market, they took some industry figures and said, "We have a certain share of that; that's 15.6." But they didn't include imports in those industry figures, and there is some indication which we have not been able to verify that there are some other manufacturers locally who are not included in determining the total market. So, of course, if the market is greater than Zenith says it is, their share is proportionately less; a matter of percentage.

[171] Now, I'm frank to say I don't know how large this error is, how many mere hundreds of thousands of dollars difference it might make. We are talking in large figures here. But there clearly is an error. It does indicate an incompleteness and a carelessness in their compiling of what should be their vital figures, which is another step in discrediting this exhibit.

And on this failure to include imports, Mr. McConnell has been talking about the right to export, and properly so, but I gather that he doesn't want to recognize that the Japanese or the Germans or anybody import. He wants to ignore that when he figures his own share of the market here. I don't think he can properly do that.

Now, also in figuring these profits, alleged profits, as I pointed out, in deciding what price they could get, they haven't in figuring their profit margins—they haven't paid any attention at all to the question of tariff and taxes, and how that would affect the sales price. Certainly, if you are going to be reasonably competitive in a country, where you have to pay a 30 per cent tariff, and the domestic manufacturer [172] doesn't have to pay any, or like in Australia

where you have to pay a hundred per cent tariff and the manufacturer locally doesn't have to pay any, certainly you can't assume that you are going to be able to add all that onto the price and get the same margin of profit. You have got to recognize, if you are going to be realistic, that this will affect your profit margin, your spread. This is absolutely no recognition of that whatsoever in this exhibit.

Now, another illustration in figuring their margin of profit for Canada and what they could get for the sets, remembering again they have to be reasonably competitive, they have ignored entirely any question of selling costs or costs of getting into the market. This has been totally disregarded.

Now, it is true they are working through distributors, and maybe they think they haven't got any selling cost or import cost, but that isn't the case because their own annual reports for '58 and '59 tell their shareholders about the heavy cost of entering the Canadian market.

They said, for example, in '59 the continuation [173] of heavy cost in connection—they talk about the continuation of heavy costs in connection with radio and television receiver distribution facilities. And yet they don't take this into account anywhere in figuring out what their claimed margin of profit is, of Zenith and its subsidiaries. That isn't in the picture at all. It isn't in the picture in any of these countries. They just ignore that. [174] These figures are in a vacuum, your Honor. These figures are not related to reality, and I don't think they were intended to be related to reality. They were gotten together quickly, thoughtlessly, and without regard to the actual facts.

Now, there are a great many aspects where these figures are totally and woefully lacking in the solid accounting basis and background that they should be. The Ernst & Ernst report gives more detail on other points, and what I have given here is just an illustration. But I submit,

your Honor, that this Exhibit 218 really, with its incompleteness, with its carelessness, with its outright mistakes on the face, mistakes which are determinable after the thing is really studied—not quickly, not over a weekend as Mr. Dodds had—that these mistakes are so major and they are so pervading, I submit that this exhibit could not possibly be the basis for a judgment of sixteen million.

The Court: Of course, I am not going to suggest that you represent to me that Mr. Dodds over the weekend [175] didn't permit any accountant to look at this.

Mr. Kayser: He did, your Honor. He did.

The Court: Otherwise, why would he want it over the weekend?

Mr. Kayser: But your Honor, this is a matter of days and days. This is a very mixed-up document. This is not the sort of thing—

The Court: I would think that this accountant could suggest some questions to ask on cross-examination. There must be obvious flaws that, based on your high regard for the document, that this accountant could have said, well, ask him this, or ask him that, or did he take into account this, that, or the other thing which you now say are omitted.

Mr. Kayser: Yes, your Honor. I think it can be said that the cross-examination—that much more could have been done even in the short time available. But it is a fact that to really analyze this document takes a matter of weeks, not a matter of days, to really do the job. This was a big job, to try to understand what this document was supposed to be saying and doing. It was a big job.

Well, your Honor—

[176] The Court: Maybe this is a good time for a morning break.

Mr. Kayser: Surely.

The Court: All right. A short recess.

(A short recess was taken, after which the following further proceedings were had herein:)

[177] The Court: You may proceed.

Mr. Kayser: Thank you, your Honor.

We come now, as we must ultimately, and as we should, to the basic question of equity and justice in this case, which we have felt is the primary and paramount issue and the reason we filed the motions.

Now, your Honor has quite properly raised a lot of questions both yesterday and today as to why any relief should be granted here to Hazeltine when Hazeltine's counsel did not, during the trial or even ninety days later, in its briefing, or at any time before we filed our motions a few days ago, raise the questions which we raised in our motions and are raising—have raised here yesterday and today. Why weren't these evidentiary matters raised? Why weren't these objections made, and since they were not, your Honor says, in effect, "Should I not leave you and your client just where they are?"

Now, we must admit quite frankly that many of these things have been handled more efficiently, more promptly. We regret that they were not. We cannot [178] say, however, that some of these things which did occur might not also have occurred if we or any other firm was involved, but we do recognize that things did not occur as efficiently and as well, in some aspects, as they might.

Now, I referred previously, in answer to your Honor's question, to the fact that in asking for this admittedly extraordinary relief here that we are not doing so on the ground of newly-discovered evidence, that it is clear from the cases, it is clear from the Marconi case and all the other cases, that the power of the court to grant the relief that we seek is not limited to those circumstances.

We have also pointed out in our brief to the rule and the cases which say that even though counsel did not do

the job he should, even though he may have been somewhat derelict in not raising objections, maybe he wasn't as fast on his feet as he should have been, maybe he wasn't used to this kind of a trial of a case, but when major prejudice results that the law will not be heard to say that the client shall be made to suffer when the prejudice is major, when the effect has been in fact to deprive that party of his right to a fair day in court.

[179] Now, there is one other aspect, too, I think that your Honor really ought to consider, and that is that this coin has two sides; we have our side of the coin, but let's turn it over and let's look at Zenith's side of this coin.

Now, the fact of the matter is that the cause of action which Zenith now asserts and which is in its findings could have been pleaded by Zenith in April of 1960 when they filed their answer. This theory of damage by reason of the acts of these pools, this theory of inability to enter the markets in these countries, this theory of loss of profits from the tour of markets and all that sort of thing beginning in May of '59, this could have been pleaded in April of 1960, or almost four years before this case went to trial.

[180] The Court: Maybe the explanation of that was that in April of 1960 there was only a patent lawyer on the other and not a—

Mr. Kayser: Well, I have no knowledge of that, your Honor. I do not believe so. I understand that Mr. McConnell has been general counsel of Zenith since long before that.

The Court: I am talking about the names on the briefs.

Mr. Kayser: Well, I can't answer that, but the fact is that this cause of action could have been pleaded four years ago and it was not. Instead they came along in May of '63 with this very limited make weight counter-claim, which I think quite frankly was pleaded as an excuse to

keep in the case paragraph 13 of their answer. That is the reason for it, and they had to think up some basis of bringing it in so they said, "All right, we have got this lawsuit. We are charging now that by reason of these recent facts Hazeltine Research has used its domestic patents in this fashion and somehow this has some vague connection with our overseas operations."

[181] But the fact is that that is the lawsuit that they pleaded and, sure, they had all of these allegations of international conspiracy and so forth that your Honor has referred to. These are in his background as historical material, but these were not the acts which were charged as the things which caused the damage. And then it was not until during the trial, after we had the long Dodds affidavit and all of this testimony that suddenly, gradually this new theory starts to creep in, this new theory where we go back and try to recover again based on these allegedly wrongful acts many, many years ago.

The Court: I must assume, to go along with that, that counsel at that time didn't read the pretrial brief which clearly set out, prior to the trial, this theory that you were taken by surprise by during the course of the trial.

Mr. Kayser: Well, your Honor, as I say, I would also have been taken by surprise because I do not find that theory of action in Zenith's pretrial brief. The references to the international conspiracy I do not find as indicating that that was the claim for his damage action.

[182] The Court: You go ahead, and I will see if I can find it for you.

Mr. Kayser: Yes, sir.

Now, your Honor has commented, and I think quite correctly, that a lawsuit has got to come to an end sooner or later. There is no question about it. But in weighing the equities in this case, who is it, your Honor, that has caused this delay? Yes, Hazeltine possibly should have

objected during the trial and possibly the counterclaim as pleaded would have been dismissed. Possibly your Honor would have said, "Zenith may amend and we will adjourn for further discovery. We will let Hazeltine file its affirmative defenses," as we seek leave here to do. But there, again, would have been a delay caused by Zenith.

What if Hazeltine had raised this thing three months—when it finally saw the theory in Zenith's findings, there again would have been a delay caused by Zenith; and, so, although we acknowledge the fact of a delay, the fact that things were not handled as well as they would be, we suggest that the real delay, the major delay, and the major dereliction of duty here rests on Zenith, not [183] on Hazeltine. If that is to be the basis of weighing a decision, your Honor, we say that by far the greatest fault rests on Zenith and not on Hazeltine. I mean, if that is to be the basis of a decision.

[184] The Court: Let me call your attention to page 58 of the pretrial brief, which after going into the question of pools and that sort of thing they then summarize under a heading. "The Conspiracy Issue in the Instant Case."

> "As shown above, the Zenith counterclaim asserts a conspiracy between the Hazeltine Company and a large number of foreign companies wherein and whereby the inventions and patents of the conspirators have been pooled and the participating conspirators have then agreed not to license the pool patents of any of them in any manner that would permit exports of radios or television sets from the United States to the respective countries in which the pools are created."

Now, if that isn't a red flag, isn't it a little bit of a pink flag as to what the evidence is going to be in the trial of this lawsuit?

Mr. Kayser: Your Honor, it might be a little bit of a

slightly pink flag as a matter of Monday morning quarterbacking. I say that respectfully, but—

The Court: Except that this is before the football [185] game even started. This is before any evidence was adduced.

Mr. Kayser: Yes, as a matter of Monday morning quarterbacking you say now, "Now that the evidence is all in, now that the findings are in—" possibly this should have alerted him a little bit.

But, your Honor, there isn't anything in there which said to Hazeltine, "We are abandoning our theory that the acts which caused the damage were the pendency of the suit and the threats of infringement."

Your Honor, all this talk about international conspiracy and so forth, that was all in the counterclaim as pleaded. That was all in the background. That was all in this Paragraph 13 which they strove to retain by filing the counterclaim in the first place. That is nothing new.

The Court: Don't you think that any lawyer reading that would anticipate that it was within the realm of possibility that some proof might be offered in regard to damages suffered by virtue of failure to permit exports to these countries from the United States?

Mr. Kayser: Your Honor, you said just a few [186] minutes ago that we proceed on the basis of a notice pleading.

The Court: Yes.

Mr. Kayser: This is not notice. The notice is in the counterclaim.

The Court: I know. And do you want me to read that portion of the counterclaim upon which this is based? You will find that on page 68. I am reading from 58.

Mr. Kayser: I am aware of that, your Honor.

The Court: All right.

Mr. Kayser: But this is not what Zenith counsel asserted as being the acts, the theory of damage.

Now, I submit, in complete defense of Mr. Dodds, that there was no reason on God's green earth why he should say, "Is Zenith changing its theory of action on me?" Because if Zenith wanted to change its theory of action, they should have come in and asked leave to amend.

The Court: I mean, if this is pure surplusage he might also have come in and made a motion to strike this nonsense from the counterclaim which has no—

[187] Mr. Kayser: I believe he characterized it as such

A motion to strike, your Honor, you know that courts normally say, "We will leave it in. It won't do any harm."

The Court: Well, I never got a chance to say that. Nobody asked me to say that or permitted me to say it.

[188] Mr. Kayser: It is in as a fort of his theory as to why these are conspiratorial acts, the pendency of the suit and the other alleged acts of infringement. But, your Honor, we come then to another aspect, and that is this, and I think it is the final question, again putting aside for the moment the question of relative fault or dereliction of duty or what have you; the question I think this Court has to answer is whether having the knowledge of the fact that Hazeltine does have affirmative defenses to plead, having knowledge of the fact that Hazeltine did not have an opportunity to have discovery on this new theory of action, having knowledge of the fact that the Exhibit 218 is as faulty and untrustworthy as it is, having knowledge of the fact that there are in fact governmental regulations and embargos which actually overlap a part of the period of damage in England and Australia which would absolutely discredit the damage claims for those periods under any theory, the question is, can this Court, as an ultimate decision, say as a matter of equity that regardless

of all of these facts we must put them aside, we must [189] forget them and that this judgment must enter.

Now, your Honor alluded yesterday in one of his questions, as I recall, to—

The Court: I might have shortened this argument by not asking questions.

Mr. Kayser: Well, your Honor, I enjoyed it, so I am glad that you did.

—alluded to the instructions given to the jury, possibly sometime—I don't know whether it is usual, I doubt it—that in discharging its obligation to find the facts it should not be diverted from the truth by considerations of mercy, and I think—

The Court: Sympathy is the instruction.

Mr. Kayser: Sympathy, all right.

I think your Honor—at least I assume that he was asking, "Isn't that what you are doing, is asking that you ignore the facts—"

The Court: Did I get a reply to that or not?

Mr. Kayser: I propose to give it now.

The Court: Oh, I see. All right.

Mr. Kayser: And my reply is this, your Honor, [190] we don't consider that we are in the position of asking for mercy. We are asking for understanding. We recognize that the day is late. We recognize that our situation is a desperate one, and we recognize that there were things which should have been done which were not done. We admit it, but we do honestly believe that we are not asking for mercy, we are not asking for sympathy, we are asking this Court to make what I know is a very, very difficult decision, but a decision which we believe should be rendered in the interest of justice.

Now, that concludes my comments on the antitrust matter.

The Court: All right.

Mr. Kayser: I don't know what the correct procedure would be; I don't know whether it would be appropriate for me to make any form of an actual offer of proof of any of the documents in our offer of proof.

The Court: I think for the purpose of the record you might make an offer of proof in regard to those documents that you have handed me the last few days. I want to [191] be sure that you feel that your record is adequately protected.

Mr. Kayser: Yes.

I would like, your Honor, to make an offer of proof of the six items listed in our document, "Offers of Proof by Hazeltine Research, Inc., in support of Motion for Withdrawal of Findings and Conclusions, et cetera."

I would also like to make an offer of proof of the Ernst & Ernst report entitled, "Summary of Findings and Supporting Details in the matter of Hazeltine Research, Inc. versus Zenith Radio Corporation."

I should like to make an offer of proof on behalf of affidavit of Lawrence Dodds, executed March 18, 1965, together with the notice, motion, Crotty affidavit, and draft of counter-claim attached thereto.

I should like to make an offer of proof of the date of the affidavit of David Westerman, executed March 25, 1965.

All of these documents were filed with the Court last Friday.

[192] I would also like to make an offer of proof of the document entitled, "Excerpts from Zenith's Annual Reports" which was handed to the Court and to Mr. McConnell, including excerpts from those reports for the years 1957 through 1962.

I would like to make an offer of proof of the two page document entitled "United Kingdom Embargo" and of the copy of the Western Union Telegram from Mr. F. Standon of the Tariff Division Board of Trade, London, to Mr.

Charles E. Hussey, copies of which were handed to both the Court and to Mr. McConnell yesterday.

I would like to make an offer of proof of the one page document on the letterhead of McDermott, Will & Emery having reference to a telephone conference on March 31 with Mr. Niall of Blake & Riggall.

I would also like to make offer of proof of all of the Zenith Annual Reports which were referred to in the—

[193] The Court: Is there anything in them other than—of relevancy other than the excerpts?

Mr. Kayser: Well, excerpts and also as to evidence as to when they went into radio and television. But, of course, Mr. McConnell has the originals available, but I want to make it clear on the record that our copies, our complete copies are available for inspection.

The Court: All right.

[194] Mr. Kayser: Now, your Honor—

Mr. McConnell: Does that complete your offer? Does that complete your offer?

Mr. Kayser: I believe I offered the Ernst & Ernst report.

The Court: That is right.

Mr. Kayser: Your Honor, we also filed—this does complete my offer on this.

Mr. McConnell: Well, I want to object to all these documents on the ground that there is no proper foundation for them. They are out of order. They were not given at the trial of the case.

The Court: I don't know that you can object to an offer of proof. I don't know that there is any ruling necessary as far as I am concerned. I'm not receiving them as evidence. I think for the record, he is entitled to make an offer of proof, and that he has done. And his record, in my opinion, is adequately protected by virtue of that.

Mr. Kayser: Your Honor, there is the aspect of the other motion we filed having to do with the misuse issue. And as your Honor asked me, and as I acknowledged yesterday, this is an entirely different category. We [195] make no suggestions that anything occurred which deprived Hazeltine of the opportunity to make full proof. I am prepared to argue that. I wonder whether if your Honor has had the chance to consider it, and whether, if possibly—we think that our motion in brief covered the thing rather adequately. We argue no new aspects or points to add.

Now, I am prepared to argue, if your Honor would like to hear me on it. Otherwise, I rely on the motion.

The Court: I have read what you have filed. If you feel that that is adequately presented, there is no purpose of—if you have nothing to add, there is no purpose in reiterating or reading to me what I have already read.

Mr. Kayser: Yes. Well, we feel that does cover the situation, and quite frankly we have filed that because we felt that—

The Court: Isn't the question in regard to misuse a question of the sufficiency of the evidence and the credibility of the evidence rather than anything else?

Mr. Kayser: Yes. Really, we have two points that [196] we have pointed out; that the matter of coercion, again, is not a matter of legal theory but a matter of fact, and we have offered to show the specific licenses which others took under this formula which Zenith says is so coercive. The others were not in fact coerced. The others who took the licenses were much smaller—

The Court: Who was going to testify as to whether they were or weren't coerced?

Mr. Kayser: Your Honor, the fact is they weren't coerced, because they refused—failed to take the package which Zenith says was coercive.

Zenith says this package had the purpose and effect of requiring them and others to take the complete package. And we say that that obviously is not coercive as proved by the fact that we have all these other licensees who weren't coerced in any way.

[197] This again, your Honor, is a matter of fact. It is not a matter of abstraction—is a 15 per cent, 80 per cent, 100 per cent license coercive. That can't be decided as a matter of abstraction. And for that reason, we have offered to prove the licenses themselves.

Why we did that was, that the licenses were referred to more or less hastily and fleetingly as a part of the patent case, and they were not, as they should have been, brought specifically to your Honor's attention in connection with this question of coercion. That's why we make that offer.

The Court: All right.

Mr. Kayser: And also on this contention of coercion, because they said the $200,000 ceiling applied only if the entire package was taken—again, we are making an offer of proof of licenses where the ceiling is given without the entire package, which is evidence which was not and should have been—but was not offered to this Court. And frankly we have also reargued Mr. Crotty's—

The Court: Had they been offered, under what theory of evidence would they have been admissible?

[198] Mr. Kayser: As evidence that it was not Hazeltine's policy to deny the ceiling if you did not take the package. In other words, the proof of the pudding, your Honor, is in the eating, and that's why we would want to offer these—to prove that this was not the company policy.

The Court: That would fly in the face of some evidence that was adduced.

Mr. Kayser: Well, your Honor, as I started to say, we have taken the liberty of examining that evidence. Actually.

that evidence does not support the conclusion they seek to draw. Because all they had was, Mr. Crotty said he assumed the ceiling applied only if you took the package. And if you read the paragraph itself, and if you read his testimony, you can see that this was an assumption he chose to make for reasons that we suggest in the agreement—that, as a matter of fact, any normal businessman negotiating in good faith for a license, if he saw that paragraph and actually thought that it might mean what Mr. Crotty at Zenith said it meant, would have picked up the phone and asked. He wouldn't have said, "Well, I am going to assume that I can't get the ceiling except with the package." This isn't the way businessmen operate. [199] This again is an illustration of steering clear of reality. This is not a matter of an abstraction, your Honor. It is a matter of what are the facts.

Now, since I am this far, I will cover the last point briefly.

The Court: Very good.

Mr. Kayser: And that is this: The third ground for a finding of misuse here was the idea that if it was a misuse of patents, it would be a misuse of patents for Hazeltine to ask for a royalty on all sets, regardless of whether any patent was practiced or involved in the production of that set. In other words, it said that is an extension of the patent monopoly to unpatented material and, therefore, it's a misuse.

Well, your Honor, there is quite a line of cases which were not cited to this Court. One of two of them was cited on other points. But as we point out in our memorandum, there is quite a line of cases which indicate that that is not a misuse. Of course, it is another matter when you have got a question of forcing packages and so forth. But the idea that you charge a royalty based on the num-[200] ber of units that you make, whether or not the patent

is practiced in the process—that has not been held to be illegal and, as a matter of fact, there are two cases in this circuit which have approved this kind of set up. The American Secure-it case, which they rely on so heavily, has got the dictum in it which approves this kind of set up. They say that this thing is different. If this type of license set up is coercive—

The Court: Do you agree that it is?

Mr. Kayser: No, I don't agree, your Honor. Because the cases we have here in the Seventh Circuit, at least one of them, involved a case where the licensee was given the choice of this kind of license, and he didn't take it and he was sued for infringement. And the Court said this is valid. Now, what is more coercive than that, if you are going to use those terms, that he was offered this form of license, he didn't take it, and he was sued and he was held liable, and it was held that the patent was not misuse.

Well, that summarizes the substance of our other motion. And since we are in the process of making offers, while I do not have them here, I would like formally to make [201] for the record an offer to prove the license and license documents which are listed on our offer of proof attached to our memorandum in support of plaintiff's motion for withdrawal of findings and conclusions as to misuse of patent.

[202] Those are under the heading, "Magnavox, Sylvania, Warwick," which is Sears Roebuck, "Westinghouse, Welles-Gardner," for Montgomery Ward, "Packard-Bell, Curtis-Mathes, Setchell Carlson, Gianinni Control Corp., and Admiral." And, your Honor, that takes care of me until rebuttal.

The Court: Thank You.

Mr. Kayser: Thank you for your consideration, and I have enjoyed the questions.

The Court: Mr. McConnell.

Mr. McConnell: May it please the Court.

The Court: Counsel.

Mr. McConnell: Counsel has paid his high compliments to me and the way I handled this lawsuit, and he has paid his high compliment to his former counsel, and to my client, and to the accountants, and about everybody that had anything to do with this case.

Some of us are idiots, some of us are apparently dishonest. We don't know how to try lawsuits. We have to wait until counsel gets in the courtroom to find out how to do these things.

Now, he has assumed a pretty large burden. He started out to tell this Court that the evidence isn't as we said it was; that the pleadings aren't as they read; that nobody [203] knew what case they were trying. And in an attempt to make that argument, he has distorted the record and the evidence in this case so that I don't even recognize the case that I tried after listening to counsel speak. Now, that is a very dangerous procedure in this Court.

I have been trying lawsuits now for over 40 years. And if I may be permitted to say, I have never been before a Court with a finer clearer memory of what occurs in a courtroom, and what occurs in the presentation of evidence than in this one. And when counsel attempts to come here before your Honor and tell you things which you must know are absolutely not true, to tell you what happened in a lawsuit which he never had any participation in whatever, to criticize counsel, to criticize witnesses, to criticize litigant, and to assign ulterior motives to every action that is taken in this lawsuit, I say that man has a terrific burden in this Court.

His first charge is that I deliberately tricked Mr. Dodds, Mr. Diggins, the firm here, the McDermott firm, the firm down in New York of some 163 lawyers in it, Kenyon & Kenyon, and all the other lawyers that have had a part

[204] in this case. And that suddenly, one year after the case has been submitted to this Court, Mr. Dodds wakes up, obviously at the prompting of Mr. Kayser, and decides that all that time he has been surprised by my trickery. Not a word about it during all the time the case was under advisement; not a word about it when the proof was admitted. In fact, much of the evidence came in without objection.

This terrible document, 218, as I will show, came in without any objection at all. And the documents counsel throws on the floor were requested by Mr. Dodds from our accountant. They were his work papers, things that he had gotten up for his own use in preparing the exhibit. And Mr. Dodds requested them, and we brought them in pursuant to his request, and he used them in the cross-examination of Mr. Stevenson.

[205] It wasn't even typed, counsel says. Why, of course, it wasn't typed. They were his work papers. And that is the sort of trivia and piffle and misstatements we have goten all the way through this presentation, and I am a little bit annoyed by it.

I tried to honestly, in accord with the ethics of my profession, to present an honest case in this Court. And I have this Johnny-come-lately come in here now and tell me that all I was attempting to do was trick and bamboozle this Court. I think I have a right to be a little annoyed about that sort of a position.

And it was not only in this case that I misled courts and people. I had a case for Zenith involving a world-wide cartel where they stopped commerce between the United States and foreign countries, and every large corporation in this world practically was in it. And they had tremendous power all over the world to control the markets of the world and to divide them up. And Hazeltine was in every one of them. And he says that by some sort of lei-

sure demand, slight demand, I took that sort of a claim against all the companies in the world, naming three of the largest in my case, and they all came in for an unknown [206] lawyer represented by the largest law firms in the world—John Cahill, one of the leading lawyers in this country, Whitney North Seymour, former president of the American Bar Association, as fine a lawyer—this man doesn't even deserve to be in the same room with that man.

And they paid my client ten million dollars in cash, twenty-two million dollars in forgiven claims for royalties, free licenses all over the world, a total result accounting to some forty-five million dollars, and breaking up a vicious conspiracy which stopped American trade. And I am criticized in this Court for that sort of a result.

I thought I did something in that case which is deserving of recognition by the legal profession on the ground of enforcing recognized public policy in the traffic, in commerce, in the business of this country.

Those leading lawyers—Sir Hartley Shawcross is one of them, the man who had the Nuremberg trials for England, was one of them. According to counsel, he would have you believe they paid me all that money—my client all that money, with no fact of damage, anything—no damage done, he says.

[207] Men who knew more about the antitrust laws than this man will ever know looked at this case and settled it, and they settled it not because of me, not because of my trickery, not because of my client, but because they had no defense.

What does his client do? His client, fortunately for them, was not in that case. But they were named as a co-conspirator. They knew the result; they knew the facts; they knew what it was based on.

Mr. Dodds, pursuant to the order of this Court, came

to our office and worked and worked for days and weeks reading the evidence in that case—not only the evidence of the pools, but the evidence of the damage which the pools had caused to Zenith and other exporters. They went into this thing with their eyes wide wide open, laughing at the result.

Your Honor will recall Mr. Dodds telling your Honor that he was in these pools, and he was going to stay. And he was an official of this company, not just a lawyer. He knew exactly what those pools were doing. He knew exactly what those pools were attempting to do all over the world, and he knew the business motive back of it, and he as a patent lawyer knew that nobody—nobody could do [208] business in the face of the assertion of 5,000 patents against their distributors and retail outlets, and the company itself.

The threat of damages of those—we tried one patent suit here before your Honor. It cost us over $50,000 to try it. They alone have 500 patents in their portfolio which they can assert time after time after time. And they threatened that very thing, and they threatened it after this lawsuit was started. And the pool—and I am going to get to that evidence too. He just doesn't—he either doesn't know this or he is deliberately attempting to mislead a Court which does know the record. And I say that he has a tremendous burden.

[209] Equities in the case. A little bit of a company, he says, picked on by Zenith; an attempt to put them out of business. When the pool came down here after this—in 1959, within the damage period, he says there is no overt acts or anything. Within the damage period, McConnell comes down here—

The Court: Wasn't that ten days before the damage period, May 12th instead of May 22nd?

Mr. McConnell: Well, it was so close—

The Court: All right.

Mr. Kayser: The statute says four years.

Mr. McConnell: And that is the phoniest argument on statute of limitations that I have ever heard in my—

The Court: You will get to that later. I am sorry I interrupted. I just thought ten days might make a difference.

Mr. McConnell: Your Honor recalls that testimony. Mr. McConnell came down here and said, "You can't import sets up here in Canada. You haven't got a pool license."

And how do we get a pool license? He sends us the standard form of license. No license if you are doing [210] business except in one way—manufacturing in Canada.

No license to import. If we don't have a license, we can import and we get sued.

And about the same time, they send out a circular signed by the pool, all the people in it, telling the distributors and the retailers that if they handle sets imported without the license of the pool, they are going to get sued for infringement.

Now, how in the world do you do business in the face of that?

Oh, where is that big chart? You have got props all over the place. You had a big chart showing what we actually did, and what we said we could do free of the restraints, and he criticizes us because we try to do some business, and we did do some business in spite of all the restraints.

And the law, if I remember it correctly, is that you have to attempt to mitigate your damages. And we did, and we gave them credit for it on that terrible exhibit, 218. We gave them credit for every bit of business that we did up there, taking it off the damage computation.

All right. Now, let's go back to this trickery, chicanery of McConnell. I don't know. Your Honor read to him [211] part of the pleadings and part of the pretrial briefs.

The bible has a saying for it. There is nobody so blind as a man who doesn't want to see. This man is paid not to see. He can't admit that he can read this and it makes sense to him. He's paid not to see it.

Dodds saw it. Dodds, according to counsel here, is a much stupider man than counsel, but Dodds saw it. And I am going to read Dodds' remarks where he said he saw it. What is the thing they say we didn't tell them? That they didn't know how we were going to prove up the damages? That's the gravamen of the complaint, and from that everything else flowed.

We defrauded them; we misled them; we tricked them. They didn't know what we were going to prove, and they get into court and poor old Mr. Dodds, wandering around here in a fog all that time. He got pretty vituperated at times about me and everybody else. He came alive some of the time.

But here is what I told them I was going to do. Now, I don't have to take counsel by the hand and put him before a desk, and give him the pleadings, and say, "Read it." I don't have to do that. All I have to do is write it. And if they can't read it, that's just too bad. But that doesn't constitute fraud or trickery.

[212] What we say, page 46:

> "Zenith has been damaged. Zenith has been damaged by the Australian pool in its trade with Australia in the same manner as it has been damaged in its trade with England and Canada. Proof of such damages inflicted by Hazeltine's international activities will be adduced in accordance with settled principles of the leading cases on the subject. Bigelow against RCA Radio Pictures, 327 U. S. 261, William A. Rankin Co. against Associated Bill Posters, Grepke against General Electric Company, 289 F. 2d 508."

Now, I want to read what was adduced in the way of damage proof in the case of A. C. Becken Co. against Gemex Corporation, 278 F. 2d 1, 5, which is quoted in full in the Grepke case, and the William Rankin case quoted here was also quoted in full, and the William Rankin case was cited in my statement here of how we were going to prove these damages.

Here is the testimony:

> "In the light of forty-three years experience with [213] promoting similar lines of merchandise, plaintiff, after promoting the Gemex watchbands during the first full fiscal year ending January 31st, 1956, could reasonably expect a 50 per cent increase in profits for the next year ending January 31st, 1957, a 33% increase the following year, a 25 per cent increase the next year, and a 15 per cent increase in each of the two succeeding years. Also sustained were losses ranging from out-of-pocket cash expended in losses in closing out the merchandise the defendant had first agreed, and then later refused to take back. These losses total $56,007.95. In addition, $780.00 was a salary outlay for promotion of defendant's line at Field's, the benefit of which was lost when the cut-off by defendant halted further sales of its merchandise."

In other words, this man was cut off just like we were.

> "Plaintiff concedes that about two-fifths of this item [214] might be fairly deducted because of sales made during the two years of this promotion activity before the date of the cut-off. Total losses to plaintiff thus shown amount to $56,475.95."

Now, here is what our court said, the Court of Appeals of the Seventh Circuit:

> "We do not consider that the proof of damage offered by plaintiff were speculative in nature, and

that it is impossible to contend that plaintiff has been damaged by the action taken by defendant, as the latter contends. Rather, we think that there was no speculation as to the fact of actual damage and that plaintiff's business was seriously curtailed by the cut-off by defendant. It is not the law that the defendant who caused the damage can be permitted to escape liability because it is difficult for plaintiff to express in terms of dollars the damage it has suffered."

Citing the Rankin Case.

"This evidence, while purely an estimate and intro-
[215] duced as such, was proof of a kind as definite and certain as the subject matter admitted. It had to do with what was never actually earned because of defendant's wrongdoing. The witness testified from his knowledge of the business history, made his calculations upon what appears to be a reasonable basis and the defendants had ample opportunity by cross-examination or the offer of their own evidence on the subject to discredit him and show any fallacy in his reasoning or testimony."

[216] As I say, that Exhibit 218 went in without any objection whatever after counsel had cross-examined the witness who prepared it for two days. Then he asks leave—or in the course of it he asks leave to have time to have the exhibit examined by his accountant. And he brought in a Mr. Hart, who had been with Arthur Andersen & Company, certainly as good a firm as the one that they are talking about here, and he took the exhibit away with him and he examined it and brought it back and he further examined this witness with the obvious help of the accountant and then put the accountant on the stand to testify as to what was wrong.

Now, you can get accountants' opinions on accounting practice on any and every subject, and I have seen it done.

The Court: You don't need to belabor that subject.

Mr. McConnell: I know, just like expert testimony. They had an accountant. The point is they had an accountant who was reputable. They gave his qualifications. He had had the proper training. He had been with a [217] real first-class accounting firm and he examined the document in the time he requested of your Honor and which your Honor gave him, and he requested no further time. And he closed his cross-examination and was convinced as to the accuracy of that document and permitted it to go into evidence without one single objection. And that is the document which has no verity, no truth, nothing in it at all.

Now, talking about Monday morning quarterbacks, counsel brought up the subject of Monday morning quarterbacks, what he could do with a lawsuit after somebody else has lost it.

I want to leave this thought with your Honor before this recess, and your Honor, before you were on this bench, was an experienced trial lawyer. Some judges are not, but you were. There comes a time in the trial of lawsuits when a counsel has to determine which way he is going to go with his proof, which is the most, which is the least serious in effect upon his client's rights.

In this case, this whole defense was framed on the theory that there was no conspiracy, that this fellow McConnell was just dreaming things up that never happened. And he sat there and grinned and laughed about the idea [218] that there was such a conspiracy. That was his pitch. That was his line. That was the way he was going with the case, and he saw—and don't let anybody tell your Honor that he isn't an experienced trial lawyer, because I am going to refer to Kenyon & Kenyon's affidavit about

him in which they say that he is one of the most experienced antitrust lawyers in the United States. He had his choice of making a big play on the damage proof, which would tend to build up credibility of the experience existent. If there was no conspiracy there couldn't be any damages. Or he could concentrate on damage proof, and he chose, he made his choice, and now our second-guess brother here comes in as a Monday morning quarterback and says, "Knowing now what I know, I would have done it differently." He probably would have admitted the conspiracy, which the other man was denying—no, I don't think that is true because he said here the other day he was going to take advantage of our claim that he was in a conspiracy, but he was going to deny the fact.

That is the sort of decision, as I see it, that Mr. Dodds made, and I don't think it was such a bad decision at the [219] moment, at the time. To bring in witnesses from all of these countries, do this and that and build up the proof of damages, it immediately appears that the only thing in that lawsuit involved is how much, how much. I faced that decision many times in my trial life, as to whether to emphasize one branch of the case or another branch of the case, and he put his emphasis upon the fact that he wasn't in any conspiracy, and a blind man could see that he was in it up to his ears all the way through.

Now, you can say that he is no good as a trial lawyer, but everybody loses lawsuits. I have lost them, counsel has lost them.

The Court: And I have lost them.

Mr. McConnell: If that is the criteria, there is very few of us that can pass, I will tell you that.

I thought that Mr. Dodds did a very creditable job, although I didn't like Mr. Dodds. But I certainly would never criticise fellow counsel, preceding counsel, anybody that worked with me in a case to come in here and tell

this court that he is a doddering idiot and knew nothing about how to try a lawsuit of this kind and that I [220] misled him and tricked him and so forth.

The Court: Is it time to break?

Mr. McConnell: Yes.

The Court: I would rather listen than eat, but I assume that some people would rather eat.

(Whereupon a recess was taken to 2:00 o'clock p.m. the same day, Wednesday, March 31, 1965.)

[221] IN THE UNITED STATES DISTRICT COURT.
* * (Caption—59-C-1447) * *

Wednesday, March 31, 1965,
2:00 o'clock p.m.

Before: The Honorable Richard B. Austin, Judge.

Trial resumed pursuant to recess.

Present:

Mr. Victor P. Kayser, Mr. Hudson Rathburn, and Mr. C. Lee Cook, Jr., on behalf of the plaintiff;

Mr. Thomas C. McConnell, Mr. Philip J. Curtis, and Mr. Francis W. Crotty, on behalf of the defendant.

Of counsel for Defendant:

Mr. Dugald C. McDougall.

[222] The Court: You may proceed, Mr. McConnell.

Mr. McConnell: Thank you, your Honor.

Now, we have in this case an affidavit which was filed by Kenyon & Kenyon, attorneys in New York. I think they are the third largest law firm in New York, a very prominent firm, in which they sought to quash a subpoena that was issued in this case. And they refer to our affirmative defenses, paragraphs 12 and 13 of the defendant's answer.

Now, those were incorporated by reference in the counterclaim. And they say that those affirmative defenses are "a sham, and for the purpose of harassment of plaintiff in delay of the disposition of this case on its merits. Copies of plaintiff's interrogatories to defendant and defendant's answers thereto are attached to Mr. Dodd's affidavit for convenience of the Court."

And they say,

> "These proceedings follow an only too familiar pattern. The same or similar allegations of misuse of patents or a violation of the antitrust laws, or both, have been raised by similarly situated defendants in each of the cases listed below, and have been decided [223] favorably to plaintiff in every case."

And they cite the Hazeltine Research against Admiral, the Air-King against Hazeltine Research, Hazeltine Research against Automatic Radio, Hazeltine Research against Avco, Hazeltine Research against DeWald Radio. Each one of those cases was tried by Mr. Dodds.

Then we had also in this case a Mr. Diggins, and he has a long record of—

Mr. Kayser: Excuse me. Could we have the dates of those.

Mr. McConnell: Do you know the date of this affidavit?

Mr. Curtis: I will get it.

Mr. McConnell: Now, Bartholomew Diggins went to the bar in 1932 in the District of Columbia. He is an author of "Trademarks and Restraints of Trade," "Patent Practices Under The Antitrust Laws"—

The Court: I think you cited Diggins in one of your briefs.

Mr. McConnell: I guess I did. And he has been a special assistant to the Attorney General assigned to the Antitrust Division, Assistant Chief, Patent and Cartel [224] Division of the Antitrust Division, consultant to the Antitrust Sub-Committee of the Committee on the Judiciary of the House of Representatives, 1956.

Now, to tell your Honor that nobody in this case on their side knew anything about the antitrust laws—Mr. Diggins sat there through every minute of that trial consulting with Dodds all the way through. Dodds is an expert according

to Kenyon & Kenyon. He tried all these cases, won them all. But counsel would have you believe that he was just a neophyte and didn't know his way around the courtroom. [225] Now, I don't want to belabor a dead horse here, but the charge has been made that I didn't tell them what the case was about, and I think I would like to read just a short excerpt from my opening statement to show that I did tell them. On page 18 of my opening statement, I stated:

> "In England, litigation in England which would prevent any distributor—the proofs will show that our distributors, people we sought to distribute our goods, refused, couldn't distribute them, because of the threat they would be sued immediately by the pool if they attempted to handle any radio sets or any television sets produced by Zenith and put into Interstate Commerce." And inter-country commerce.
>
> "And there was no way in which Zenith could obtain a license from the pool, no matter how much they offered, or what they paid, because no license under the terms of the pool and the agreement of the license —no license could be issued which would permit the use of any patent or any invention covered by any patent in a set which was imported into Great Britain. [226] It was just as strong as that. There were no exceptions to it. You could not import.
>
> "And our proofs will show that as a result, the Zenith Radio Corporation, which is, the proofs will show, the first in television in this country in number of sets produced and sold, and it is a very close second to RCA in radio in the number of sets produced and sold, couldn't sell a thing."

Then there was a reference to damages. They didn't know what the damages of the proofs were going to be, and they were completely surprised, and so forth.

On page 26, I told them:

> "So that from a product standpoint, we were a competitor equipped to compete with the best there was in the world. And from that assumption, we will have expert testimony to show that we should be able to do in that market if we had ever been able to gain access to it. And, of course, our proofs in that respect fall within the realm of the rules laid down by the Supreme Court in the Bigelow cases, where a market [227] is completely destroyed, and where the parties that are in the conspiracy have destroyed it. That sort of proof is admissible."

Now, I don't know how in the world a lawyer could explain the theory of his case any more clearly than that. And they have told you about the damage proofs, and I know a little about the question of damages because I tried that Bigelow case. And I am going to get back to that a little later.

Now, Mr. Dodds filed an affidavit in this case, and in paragraph four of it, he stated—and this is the crux of their whole lawsuit. If this thing can't stand up, they don't get off the ground here.

> "4. That the theory of action of damages stated by Zenith in its proposed findings and conclusions came" to him "as a complete surprise, not having been stated in the counter-claim."

Well, it is stated in the counterclaim.

The Court: I mean, were those filed with your original brief, your original post-trial brief—your proposed [228] findings?

Mr. McConnell: Yes, yes, they were.

The Court: He had 60 days after those were filed to—

Mr. McConnell: To come in and say something about them. He never came in.

The Court: All right.

Mr. McConnell: But it was a complete surprise to him. He says in an affidavit sworn to in this Court—now, he is supposed to be an officer of this Court, and he is supposed to be responsible for his statements. And if he comes in here with a false affidavit, and that is the whole basis upon which their whole position is predicated, it seems to me that ought to put them in a position where they make no showing whatever to even get off the ground in a proceeding of this kind.

Now, they say he didn't know the damages, and he didn't know the time that we are claiming the damages, and he didn't know what it was all about.

I am reading now from page four of the plaintiff's post-trial brief which Mr. Dodds prepared—Mr. Dodds, Mr. Diggins, and Mr. Ruestow. He doesn't know what we are claiming. He doesn't know what the periods of damages—[229] he doesn't know anything about them. That is what he says under oath. Here is what he says in the brief to your Honor:

> "In the instant case, Zenith claims damages against Hazeltine which, trebled, amount to $48,716,616. This is for the four-year period from June 1, 1959 to May 31, 1963."

Then—that shows he knows all about the damages. Does he know anything about the conspiracy issue? On page eight he says, under the caption "The Issues Before The Court"—

The Court: I thought I read that.

Mr. McConnell: I guess you did.

[230] Now, how in the world can a lawyer, in the face of those statements, in his brief to this court, come in here and say that he was completely surprised to find out that those were the issues in this case. I don't think that any comment from me adds anything to the facts.

The man has deliberately falsified. It can't be true. He knew it. He knew exactly what this case was about. He knew it all the way through. You can tell that the way that he was acting in the courtroom in counsel's cross-examination. You could tell it from his statements about the conspiracy.

And the facts of damage which counsel talks about here we argued at length, at length before your Honor. That was his argument, there was no fact of damage. And we show how we were precluded, how we were importuned, how we couldn't get any licenses up there, and we went ahead with the patents we could acquire through litigation and did the best we could. That was all argued. There is nothing new in it. Your Honor read it and heard the evidence concerning it.

Now, this is not a new experience to me. In the Radio [231] Corporation case, RCA case against Zenith, and reading from page 3 of the transcript of December 13, 1964, they got beaten on a motion and so they hire a lot of new counsel and they come in to tell Judge Igoe that now they are going to—he is going to rehear how it should be tried, and then they got some new counsel. And he said:

> "That is right, but what I can't understand about this is this, this matter has been gone into fully heretofore, answers have been filed in these cross-complaints and now they are in the process of seeking discovery. They come in here with additional counsel and try to reargue the same matters over again."

And he says:

> "I think I understand what you are doing. RCA brought additional counsel and he wants to have these motions that they are not making. Other counsel have argued them heretofore."

And we went through that all the time during that case, get rid of one set of counsel—the Thomson office was in [232] it once and they were discharged and then Kirkland's office got into it—the same thing we have got here, you never get through. You try something and you get a favorable decision and a new crowd of lawyers comes in and wants to try it all over again.

[233] Now, as I say, that is the foundation of this claim, their surprise. They didn't know what they were doing. They didn't know what they were trying—and I don't believe it. They knew what they were trying. They knew what the issues were, and I think they did a very creditable job of trying those issues, considering the issues they had to meet.

Now, of course, they tried to laugh it off. They tried to say that it couldn't exist, it couldn't be so. It couldn't be this and it couldn't be that. But the evidence was documentary. There wasn't any real controversy about it. There was no way to contest that evidence. And, of course, the Court had no alternative but to find a conspiracy in this case.

Now, what do they say, if they can open this case up, what can they now accomplish that Mr. Dodds did not accomplish or could not accomplish? Well, let's take them up—I may not be just in the same order that they used—but let's take up first the question of the statute of limitations. I just read a quote from Mr. Dodds' brief in [234] which he understood that we were suing for the four years which he described as the damage period in this case.

The Court: Are you going to touch on the point raised, Mr. McConnell, that unless there is evidence of an overt act during the four year period that they are not entitled—

Mr. McConnell: I want to touch on it.

The Court: —that you are not entitled.

Mr. McConnell: Well, the first thing I am going to touch upon is that I remember a case that was in this court years ago which involved a fellow by the name of Al Capone, and he had some lawyers in here who represented him in an income tax fraud case and they did not plead the statute of limitations. And he got down to the penitentiary and he got another counsel and they decided that he should have pleaded the statute of limitations and they tried to reopen the case, and so forth, and the court held, and properly so, that the statute of limitations is a defense you can waive. You have got to assert it. You have got to plead it. You have got to plead it the first opportunity. There is no plea of a statute of limitations [235] in this case now or at any other time. They went to trial without any plea of the statute of limitations. There isn't any question about the law on that. If you go to trial or file an answer without a statute of limitations defense in it, you waive it. It is done with. It is gone.

But aside from that, there isn't any merit in it anyway; even if they pleaded it, it would not have made the slightest bit of difference. We are dealing here with a conspiracy which was designed, obviously designed, to control a market all over the world as long as the conspirators existed. It wasn't a conspiracy for this week or next week or this year, these license agreements were executed year by year, except for the Canadian Radio Patents Limited, and that was in perpetuity. And it stated its reasons, it stated what it was going to do, and it stated that you had to manufacture to get a license and if you didn't manufacture to get that license, you couldn't get off the ground in selling your products in any of those countries.

[236] Now, that conspiracy continued and does continue to this day, as shown by the evidence in this case. After the releases were signed Mr. McConnell came down here

and asserted all the patents in that pool saying that we have to have a license. He asserted a Phillips patent also, specifically a Phillips patent, and he asserted specifically the Hazeltine patent which was in issue and in litigation in this very case as a pool patent which would be asserted against Zenith in the event Zenith attempted to export its sets. And the thing that occasioned it was that we were exporting sets, and he came down here to stop it or to compel us to take a license from the pool which would have stopped it, because that license only applied to products which were manufactured in Canada and we were manufacturing our sets in Chicago, which we had a right to do, and ship in inter-country commerce under the antitrust laws.

We had in evidence here a folder that went out from that pool after this release was signed which notified distributors and dealers that if they took sets, exported them without the license of the pool, they would be prosecuted, [237] and it went all over the trade. And Mr. Wright wrote a letter protesting that, interfering with our trade and our commerce, and he got no reply. They attempted to assert it against Motorola, and we have that letter in evidence. There is no question but what that pool continued after 1957, no question at all. It was still continuing and still affecting—and intending to do that. That was the intention of the conspirators.

Now, if there was no need for this, if there was no need to prevent export by independent action, aside from governmental action, why the complicated conspiracy and pooling of patents of all of the leading electronic companies of the world?

Of course there was a need for it, and of course there was an intention to do it, and they did it. And those were acts which took place after the release in 1957 which showed that this was a continuing conspiracy.

Now, what is the effect of the continuation of the conspiracy? This is not a new issue.

The Court: What is your reply to his contention [238] that the 1957 release also released Hazeltine from anything prior to the date of the release?

Mr. McConnell: Well, any money damages which had accrued prior to 1957, if they were joint tortfeasor, which we allege that they were, would be released, but we are not asking for damages prior to 19—

The Court: You have answered my question.

Mr. McConnell: But not in the future, and I have got a case squarely on that. There is no question about it at all. You cannot release torts which arise in the future. It is against public policy and it is void. Nobody has ever argued a thing like that, to my knowledge, except—

The Court: Even though the release said from the beginning of the world to the end of the world?

Mr. McConnell: Yes. Well, it cannot be done. Just a moment's thought will show you that that is an absolutely ridiculous contention.

Now we had this situation up before Judge Igoe in the RCA case at to what was the effect of a continuing conspiracy, one that was alleged to be continuing.

[239] The Court: Of course, I don't feel bound by his reply to whatever the question was.

Mr. McConnell: No. I understand that. I don't think that you do, but in so far as Judge Igoe's opinions are well reasoned and thought out, the logic in them certainly would appeal to this court.

He says—and I am reading from 68,475 of the 1956 trade cases in the case of Radio Corporation of America against Rauland Corporation.

He says:

> "There can be no really serious argument over the point that a cause of action for damages under the

antitrust laws does not arise with the formation of an illegal conspiracy, but rather when the interests of the plaintiff are invaded by such a conspiracy so as to cause him loss and damages—"

Citing a number of cases—

"that being so each continued invasion of interest causing loss and damage is to effect a new cause of action and the statute of limitations begins to run when it occurs and as the above cases hold."

[240] Now, what he has held there—I don't need to go into the issue we had before him because it is a little different than here—but what he held there was that you can't start the running of the statute of limitations from the time the conspiracy was formed. And you don't have to go back and ask them each day whether or not the conspiracy has been formed. If a conspiracy is formed and it is acting against a business with the intention of controlling a business and is still in existence, the statute runs during the four years in which it is operating against that business.

Now, here is the four years against our business which are set forth in the counter-claim where that conspiracy was in existence.

Now, you don't get out of a conspiracy by the statute of limitations. You just can't get out that way. The leading case is the case of Hyde against the United States, 225 U. S. 347, 369, 56 L. Ed. 1114, 1127:

"Having joined in an unlawful scheme, having constituted agents for its performance, scheme and agency to be continuous until full fruition be secured, until [241] he does some act to disavow or defeat the purpose, he is in no situation to claim the delay of the law as the offense has not been terminated or accomplished, he is still offending and, we think, consciously offending,

offending as certainly as we have said as of the first moment of his confederation and continuously through every moment of its existence."

[242] And then there is a companion case to that which has its application here in view of the argument that this is a little company and so forth. Well, it isn't a little company, it has got forty-seven million dollars of gross income a year.

But aside from that, it joined together with all of these mammoth companies who controlled trade all over the world. And what was the effect of that? In the case of United States against Kissel, 218 U. S. 601 the court said:

"A conspiracy to restrain or monopolize trade by improperly excluding a competitor from business contemplates that the conspirators will remain in business and will continue their combined efforts to drive the competitor out until they succeed. If they do continue such efforts in pursuance of the plan, this conspiracy continues up to the time of abandonment or success. A conspiracy in restraint of trade is different from and [243] more than a contract in restraint of trade. A conspiracy is constituted by an agreement, it is true, but as a result of the agreement rather than the agreement itself, just as a partnership, although constituted by a contract, is not the contract but is a result of it. The contract is instantaneous. The partnership may endure as one and the same partnership for years. A conspiracy is a partnership in criminal purposes."

They have not abandoned this conspiracy.

Mr. Dodds told your Honor that he was in it and that he was going to stay in it, right in the courtroom he told you that. He never made any attempt to get out of it—as your Honor said the other day, RCA and General Electric, at the point of a gun, after they had been forced to pay

damages and had a government decree against them, they, in a sense, got out of the pool. They would license their patents independent of the pool and the pool advised [244] people to that effect. But nobody else did. Hazeltine didn't, and why, why, and how could they get out by the statute of limitations when they are continuing their illegal activity right down to this very moment? And we want an injunction enjoining them from continuing it so that we can get in that market?

[245] There isn't a case in the books, not one, which holds that a continuing conspiracy can be barred or sanctified or made legal by any statute of limitations. And the period of damage and the period involved in the four-year period is when we were prevented from exploiting and carrying on and conducting our business as we could in a free market. That is what the gist of this complaint is about, and I am sure that your Honor understands it.

So I say there is nothing to the statute of limitations. If they had such a defense, the time to have urged it was at the pleading stage of this case and not a year after the case has been submitted, and there isn't any merit in it anyway. He hasn't cited any cases in his brief or anywhere else that hold that a continuing conspiracy is barred by the statute of limitations for the period of damage prior to the complaint or the cross-claim which under the statute is four years.

Now going to the question of a release; now, here, there was a case where there was a continuance of the wrong and a release was pleaded, an attempt to bar future violations of the antitrust laws. The case is Westmoreland Asbestos [246] Company against Johns-Manville Corp., 39 F. Supp. 117 at page 119.

Here is what the court said:

> "If plaintiff's release is to operate as a complete defense, it must be shown that the intention was to

cover the defendant's subsequent misconduct, if such it was. Perusal of the instrument negatives any such view. The release spoke as of the date of its date. The contemplation of future wrong was not within the minds of the parties. Indeed, if the instrument purported to absolve defendants from liability from future violations of the antitrust statutes, I should hold it void as against public policy."

Citing the case of Raytheon Manufacturing Company against Radio Corporation of America, 1 Circuit, 76 F. 2d.

In other words, the parties could get together and obviate, negative the antitrust laws by agreement between themselves, and that certainly was never intended here.

[247] The Court: Well, it is your position that in view of the fact that the public is involved you can't give a release that will permit this to go on—

Mr. McConnell: Certainly, the public has an interest.

The Court: You do agree, I assume, that if the public hasn't an interest and this is something only between two parties on the release that it can be done?

Mr. McConnell: Well, if there is no public policy involved—

The Court: That is what I mean.

Mr. McConnell: But all torts are against public policy. This is a tort. It is more than a tort, because as your Honor well knows, the treble damage provision of the antitrust laws was put in there by the Congress to assure the protection of the public interest in a free market.

[248] By that device, by the private litigant enforcing the antitrust laws for his own protection, he has a deprivative, a fact—to protect the interest of the public.

The Court: I am aware of that.

Mr. McConnell: All right. So I say there is nothing to the release point. Now, there are one or two things that

they want to have your Honor relitigate here. They want you to open up and have you relitigate it all. And I most respectfully submit it has no merit at all.

Now, I want to go to another thing that a great deal of stress was placed on. Can I have that license, that Number 7 license?

In the offer of proof, and in the moving of papers here, counsel told your Honor that we have really flimflammed this court; that there was a license, License Number 7 in Australia, which from 1951 on created an open and a free market.

The Court: As far as the pool was concerned?

Mr. McConnell: As far as the pool was concerned. That everything I have been telling your Honor was [249] false; that they could get a license from 1951 on; and he comes in here and waves around License Number 7.

Now, if License Number 7 is examined, your Honor will see that it is identical with License Number 6 except for the date. And we produced License Number 6. We asked them to produce it, but they didn't produce it. We put that in evidence in this case.

And instead of showing that it gave a free license, it not only proves that that is not so, that that is a deliberate misstatement of fact, but it also proves the pool, and the conspiracy, and everything else that we have been talking about in this case.

The grantors in this license are Amalgamated Wireless of Australia, Standard Telephone and Cables Limited, N. V. Phillips, Glow Lamp Fabriken, Neutrodyne—Neutrodyne was the one that under agreement—as your Honor will recall, we put in the agreement—that all the licensing rights of Hazeltine, and they corresponded back and forth, and said, "Just don't put it in writing; we can have [250] our agreements without writing."

And they put all the Hazeltine patents in the pool—

Neutrodyne Proprietary, Limited, and Electric and Musical Industries, Limited, and Pi, Limited—there they are. They are the conspirators; they are the pool owners. They are the ones that created the pool.

Here is the next recitation:

> "And whereas the licensee claims to be a bonafide manufacturer of broadcast sound receivers and/or television receivers and/or radio gramophones, and as such manufacturer has applied to the grantor to grant, and the grantor has agreed to grant to the licensee a license under latter's patent and upon the terms and conditions hereinafter mentioned and in consideration of the royalties reserved and assessed upon, the basis agreed upon between the parties as being convenient.
>
> Now, therefore, it is agreed as follows."

[251] Now, in the agreement it is agreed—and a violation of this clause forfeits the license; they must put on each receiver they manufacture this caption in a plaque:

> "Number blank. This instrument was manufactured under a license granted by Australian Radio Technical Services and Patents Company"—that's ARTS—"in respect of latter's patent controlled by it for the reception in the Commonwealth of Australia and such territories as made from time to time be administered by the said Commonwealth of sound and televised broadcasts by wire.
>
> "Plates complying with the above may be obtained from the grantor and no such plate shall be removed from any broadcast sound receiver or television receiver or radio gramophone, or any other apparatus, without the previous consent in writing of the grantor, and no broadcast sound receiver or television receiver shall be or be deemed to be licensed hereunder unless

[252] such a plate be attached thereto, and the absence of such a plate so marked from the broadcast sound receiver or television receiver shall be conclusive evidence that the same is not licensed hereunder."

[253] They had to manufacture under that license, under ARTS patents in the pool, and the ARTS patents in the pool were for manufacture in Australia. They couldn't be anywhere else. They were Australian patents, and you have to manufacture in Australia to get that caption that went on your set. And if you didn't have it on the set, you had no license.

And counsel comes in here and solemnly tells your Honor that that is an open license to import into Australia. And that's of the same tenor, and of the same character of all the rest of his arguments here. We misrepresented things; we misled this court. This proves exactly what we said it proved, and we also introduced the components so that a man couldn't avoid this by components, by bringing in components and assembling them. There he had to show that they were licensed too, and he had no license to import any component at all. Never granted by the pool.

That's another thing they are going to prove up if a new trial is granted. And it proves our case; it proves the pool. It proves they were in it. It proves the Hazeltine [254] people were in it, and it proves they restrained and restricted the market, and there was no way we could do it.

What did we have to do—go and ask them each day whether or not the pool is open? They are all bound together in a contract not to give us a license except upon the specific terms which stopped the import of our receivers.

Now, what else have we got in this case? Those are three things.

The fourth thing is that we haven't any proof of dam-

ages in this case. I am going to need those other transcripts. I want the one of Henderson. Pardon me.

This thing approaches the ludicrous. I told your Honor this morning, the leading lawyers of the world paying us $45,000,000 when there is no damage, no fact of damage, couldn't discover any fact of damage—that's all in this record.

We had a man on the stand. We didn't put him on. He was put on by our opponents in this lawsuit, and he was put on to prove that we were way out in left field on this thing because this Canadian Radio Patent, Ltd. was simply protecting its patents under the Canadian patent laws. [255] And we haven't heard anything about that issue. And Mr. Henderson got on the stand and he couldn't stand up on cross-examination, as your Honor recalls. And it was perfectly apparent that the patent couldn't be construed that way.

But he did put in evidence that he had represented this pool in proceedings before a Royal Commission, and he read into evidence the following, and I am quoting from page 1111 of the transcript:

> "The portfolio in respect of which CRPL had the right to grant licenses consisted of 5,000 patents, and in the absence of a license from CRPL it is doubtful if anyone could sell in Canada a radio or television receiver."

A radio or television receiver: Not just a television receiver; a radio. This is their words:

> "CRPL indicated that it does not grant a license to any importer of radio or television receivers, except in the limited situation where the type of kind of [256] radio or television receivers sought to be imported is not manufactured by any radio or television receiver manufacturer in Canada. It is particularly in

respect of the policy of CRPL in precluding importers from bringing into Canada radio and television receivers that the complaint was made to this Commission."

Now, here is a Royal Commission holding that it is doubtful if anybody could import anything in the face of those restrictions. And if your Honor gives it thought, which you have already given, how could a little distributor or a dealer stand up against a threat of patent litigation under 5,000 patents? You are dead. You can't do it. You can't sell anybody under a threat like that.

[257] We established our own company up there, and we made a little progress with the limited patent protection we had, and we did mitigate the damages. But there isn't the slightest question in this world that that precluded export of radio.

Now, this is all in the argument. This is something we went over and over and over again.

Have we got the notice that they sent out to the trade? This pool sent out to all the trade—this is in the evidence in this case:

"Warning: Be sure your radio is Canadian made, is safe to operate, complies with the Canadian Electrical Code, is licensed under Canadian patents. Use of an imported radio means you are liable for damages, for infringement of Canadian patents."

And they have a special section:

"Infringement of Canadian patent rights: Only Canadian made, Canadian sold sets are licensed under the basic patents of Canadian Radio Patents, Limited. Use of radios manufactured and purchased outside the Dominion of Canada may constitute an infringement of Canadian patent rights, infringement of patent [258] rights, and naturally makes the owner liable to legal action."

That was run in all the papers up there, circulated among the dealers, and that was done after this so-called release. Of course there was an impact on our business. It was intended to have an impact on our business.

And all of this talk about not advising the Court of Tariffs and all that—when you read Mr. Wright's testimony and when you read Mr. Kaplan's testimony you see that they did take those things into consideration, and they did have knowledge of the factors which were involved.

Now, counsel—no matter what I do, it's wrong. I put on the witness stand here before your Honor the president of the Zenith Radio Corporation. He is the chief executive officer. He is familiar and supposed to be running the company. He's familiar with it; he is a brilliant man; he's had a tremendous success in business, and his company has had success under his management.

He told your Honor how he computed this, and the way it was gotten up, and it was the same sort of computa-[259] tion that was used in the RCA case, comparing our market with theirs. How else could you do it.

As your Honor pointed out in the argument this morning, they destroyed any other comparison. They intentionally destroyed it. They wouldn't let any set be imported. How in the world else could you do it. You can't compare a market which does not exist. You have got to take the best brains and ability you have in the business, and let them tell you what would happen if they were given access to the market free and unfettered from these illegal restraints.

Now, Mr. Wright wasn't a novice at this. He had been through the RCA case. He knew rules which are involved in computing damages; he knew the facts; he knew what his company had done. They are the first in television, and they are now the first in radio, I understand. They had comparable competition—the same companies that

they compete against here, their foreign counterparts are up there. The advertising goes across the two countries. The programs go across between the two countries. It was a comparable market, comparable in all respects except the restraint of trade, and those were created by my opponent. He was one of them.

[260] Now, I said that I had some knowledge of the proof of damages. I had a case years ago involving the Jackson Park Theater, and I don't know what I was supposed to have done wrong in that case, but I happened to win it before a jury. And it went up to the Court of Appeals, and the Court of Appeals listened to an argument like you have heard here this morning—that there wasn't any open market; because I couldn't compare what my theater had done with an open market, I couldn't recover any damages. And the Court of Appeals bought it. They destroyed the open market. And certiorari was granted, and the case went to the Supreme Court of the United States. And the Supreme Court, I thought, had written finis to that contention.

[261] The Supreme Court in the Bigelow case, 327 U. S. 251, said:

> "The jury may make a just and reasonable estimate of the damage based on relevant data and render its verdict accordingly. In such circumstances, juries are allowed to act on probably and differential as well as upon direct and positive proof. Any other rules would enable the wrongdoer to profit by his own wrongdoing at the expense of his victim. It would be an inducement to make wrongdoing so effective and complete in every case as to preclude any recovery by rendering the measure of damages uncertain. Failure to apply it would mean that the more grievous wrongdoing, the less the likelihood there would be of any recovery. The most elementary conceptions of

justice and public policy require that the wrongdoer shall bear the risk of the uncertainty which his own wrong create."

They don't want to have an open market comparison. They haven't gotten out of any conspiracy. They are in it with these people and have been all the time. [262] They don't even contemplate getting out of it, and they have destroyed the comparison which could be made if an open market existed.

We were precluded. We are talking about something now which they keep us out of. And the same thing is true in England. They talk about tariffs, they talk about restrictions, they talk about all that. That wasn't so, as he stated this morning.

I took that evidence over there. I know what the evidence was. You could get imports into England even during currency restrictions, by government permit. You had to apply, but that doesn't mean it was an embargo. There never was an embargo—never.

And the same thing is true down in Australia. You have to apply for a permit, or did up to a certain time. But that doesn't mean that imports are precluded. And if they were, why all of this machinery to pool patents, to use them, to cut trade between countries?

I submit to your Honor that there was a fact of damage which was so clear that nobody could misunderstand it. It was designed to damage any person in the United [263] States in the business of manufacturing radios and television sets. There wasn't any question about the fact of damage. Just like in the movie case, we couldn't get the pictures. The Court—why, of course, there was a fact of damage. That's obvious on the face of it. We couldn't get the product. Here we couldn't sell the product.

The fact of damage is self-evident and it is proved by the fact that the pool was still operating and is still

operating, and still acting to prevent this flow of foreign commerce between these states which this Antitrust Act says cannot be stopped by agreement between competitors. And the people in these pools were all our competitors.

Now, when we get to the amount of the damage, he has takeen this 218 apart and, of course, figures don't lie, but people that are not too respectable can use figures in any way that you want. And you can prove all sorts of things with figures if you use them this way, or that way, or the other way, and they aren't subjected to the proper analysis.

Well, just take one instance in his brief. He says that because we have a profit-sharing plan out at Zenith, that that's a cost, and that we didn't take that cost into [264] consideration in determining what our net profit was, because we had to divide up the profit. Now, that is a complete contradiction in turn. It's just like saying you would have to take out your income tax as a deduction in order to compute your damages. And the courts have dealt with that over and over again. That is something that is done with the money after it is earned. It is not a cost. And the accountant so testified, and there was no contrary evidence.

Now, they can get accountants to come in here and testify to anything, I assume—some theory; get a text book to say it ought to be this way, or that way, or the other way. But that isn't the record in this case.

The record in this case does not show any attempt to manipulate the figures, to torture exhibits. They were worked up and presented in good faith.

The question is raised about the accountant's work papers. They were his own work papers. They weren't prepared for this Court at all. They were produced here because Mr. Dodds said he wanted them for cross-examination, and he got them. And they were put in evidence. [265] But we are supposed to be charged with some negli-

gence or dereliction because the accountant's work papers got into the record in this case.

Now, the case which I read to you this morning, the Rankin case—exactly in point. There the secretary or treasurer of a bill-poster company was permitted to make an estimate of what he could have done if he hadn't been bared from the market. That was approved by the Court of Appeals in this Seventh Circuit. It is the law right down to date.

Now, there is one other question he didn't raise in his oral argument—

The Court: Maybe we ought to take that up in the morning, in view of the fact that I regretfully have to go to a Judge's meeting. This is much more interesting than what I will be doing for the next two hours, I assure you of that.

We will begin promptly at ten o'clock in the morning.

(Whereupon, the hearing in the above-entitled matter was adjourned until 10:00 o'clock a.m., of the following day, April 1, 1965.)

[266] * * (Caption—59-C-1847) * *

Before Judge Austin,
Thursday, April 1, 1965,
10:00 o'clock a. m.

Hearing resumed pursuant to adjournment.

Present:

Same as before.

And thereupon the following further proceedings were had herein:

[267] The Clerk: 59 C 1847, Hazeltine v. Zenith, hearing.

The Court: Well, we are ready to proceed.

Mr. McConnell: May it please your Honor.

The Court: Yes, Mr. McConell.

Mr. McConnell: I told your Honor yesterday in the course of my argument that there was such a thing as a waiver of the statute of limitations. I didn't happen to have a case with me at the moment, so I want to refer to the case of Wagner against Fawcett Publications, 307 F. 2d 400, which was decided by our Court of Appeals in 1962.

In there the question arose as to waiver of a statue of limitations and the court had this to say at page 412:

> "This record reveals, therefore, that Fawcett did not raise in any manner authorized by law the defense of a statute of limitations to the plaintiff's right of privacy action. Instead, by its motion to dismiss, it attacked the complaint on the merits, thus waiving the affirmative defense of the statute of limitations to the [268] right of privacy action."

Then the court goes on to say:

> "The raising of the defense of the statute of limitations as opposed to the time limitation in the wrongful

death act is a personal privilege of the defendant. If it fails to take advantage of that privilege in the manner provided by law, it is waived.

"Now, it was no concern of the district court, and that court had no right to apply the statute of limitations sui spondes."

There was no such plea made here. I don't think it has any relevance at all, but if it does, we certainly—the argument that your Honor should open up a case to permit the pleading of a statute which has been waived gets pretty far out into left field, I think.

Now, one of the difficulties with a trial of this kind of litigation and working in this field is, as I have found from personal experience, you are just like Alice and the Red Queen in Alice in Wonderland, you have to run so [269] hard to stay in the same place. And in their briefs here they have come up with a —not a new theory, it is not a new proposal, but they worked on practically everything they could think of, apparently, in the seven weeks and they have come up with the idea that since we didn't show that we demanded licenses in every period involved in this lawsuit that therefore we haven't shown an overt act and, therefore, we are not entitled to recover.

Well, not only do counsel work up new theories all the time in these cases, but they go back and resurrect theories which everybody would have a right to believe had been buried.

[270] Now, that particular theory—and they didn't mention it in their argument, and I don't know why they didn't but I have to answer it because it's in their brief, and I don't want to be left in the position of hearing it for the first time in the rebuttal. But that very question was raised in the case that I had in this Court, which I lost in the lower court. And counsel persuaded the trial court

that in the absence of a demand for a different playing position for a theatre that was a tenant of ours, that I couldn't have any recovery for a landlord. The landlord had leased the theatre under a percentage lease, and the theatre had been unable to get earlier pictures and was damaged. And, of course, the damage of the theater reverted to the damage of the landlord, and the landlord sued for a percentage run which he could have gotten in the absence of the conspiracy.

And the defendant took the position that since the tenant had made no demand that no cause of action had accrued to the landlord.

[271] Now, here is what the Court of Appeals—our Court of Appeals said about that in the case of Congress Building Corporation against Loew's, Incorported, 246 Fed. 2d 582, and I am reading from 595.

The Court said, and I am quoting on page 595:

> "In the alternative the defendants insist that because the plaintiff did not demand or request of any of the defendants earlier runs for its theatre plaintiff is precluded from claiming any damages. Although the parties have briefed and orally argued this point on appeal, the plaintiff proceeds on the assumption that the District Court did not reach this question. However, as we read the District Court's memorandum opinion, it appears that the District Judge was of the opinion that demand is a condition precedent. In so holding we believe the District Judge erred. The failure of the plaintiff to demand that defendants [272] refrain from their illegal trade practices could not legalize such trade practices nor immunize defendants against liability to those injured."

Citing the Kobe vs. Dempsey Pump case, and Ulrich against Ethyl Gasoline.

> "The defendants had a duty to refrain from acts in-

jurious to others and we know of no rule that states that demand is necessary in an action to enforce a liability arising from a tortious act. See generally, 1 Am. Jur., Actions Section 36; 1 Corpus Juris Secundum Actions, Section 27; 86 C. J. S. Torts, Section 51. Neither Section 4 of the Clayton Act, nor the terms of any agreement or undertaking by plaintiff with any of the defendants, express or implied, nor the circumstances of this case require a demand as a condition precedent to the maintenance of this action."

[273] Then they discuss the case which is cited in the moving party's brief here of Milwaukee Towne Corporation against Loew, and they say this about that case:

"We must confess that there is some language in the decision by this court in Milwaukee Towne Corp. v. Loew's, Inc., Seventh Circuit, 190 F. 2d 561, which lends support to the argument advanced by defendants. See also J J Theatres, Inc. v. 20th Century-Fox Film Corp., Second Circuit, 212 F. 2d 840; and see Vilastor Kent Theatre Corp. v. Brandt, and the T. C. Theatre Corp. v. Warner Bros. Pictures, Inc. However, as we read the Milwaukee Towne decision, the court did not hold that a demand was a condition precedent to the maintenance of a private antitrust suit. The case was tried on the theory of a refusal to deal, which is also true of the J J Theatres case, at least in part, and the court held properly, we think, that without a demand or
[274] request to deal there could be no refusal to deal. But that is not the case here."

Of course, the theatre made no demand for any product. The owner of the building had no demand for any product. Now, that is a later case than the Milwaukee Towne case. The Milwaukee Towne case, I do distinguish that because I was counsel in it, and it doesn't meet this point at all. I

don't think it is important, in view of the court having already distinguished it.

Now, the leading case on this, of course, and one that is very close to the one at issue here, is the case of Kobe, Inc. against Dempsey Pump Company. And there there was an aggregation of patents covering pumps, and there was a wide knowledege in the trade that there was this group of patents which were being utilized to keep people out to do business, and the court refers to that. This is 198 F. 2d; I am reading from page 424. The case is Kobe, Inc. against Dempsey Pump Company.

The court says:

> "Kobe gave wide publicity to the number of patents which it owned. An imposing list of patents was in a [275] conspicuous place in its catalogs, many of which had expired, and they were used to the limit in its attempt to stop Dempsey. The issues presented were issues of fact. The trial court found them against the plaintiff, Kobe. It found specifically that it was guilty of monopolistic practices in violation of law. On this record we cannot say that there is no substantial evidence to support the findings or that they are clearly erroneous.",

citing cases.

Then the court says:

> "There is no limit in the contention that defendants cannot maintain their cross-claim because Kobe did not refuse to grant a license to Dempsey upon reasonable terms. The proof was that such a license was never requested by the defendants and was never refused. No attempt was made to prove that such a license would have been granted had the request been made. In all the years which Kobe manufactured pumps, no license [276] was ever granted to anyone else and the licenses

which were reserved in original contracts were eventually eliminated by Kobe. When operating under the Roko agreement, licenses to others were prohibited unless consented to by Old Kobe. There is nothing here to indicate that a different policy had been adopted. The inference is that the old practice was being continued. Of course the refusal to grant a license or a willingness to grant one if requested might be a circumstance in determining whether or not there was an unlawful monopoly. It would not be controlling and would not be a defense if an unlawful monopoly actually existed."

[277] Now, they go on, on the question of damages, and they say:

"There was almost a complete boycott of their products. To hold that there was no liability for damages caused by this conduct, though lawful in itself, would permit a monopolizer to smother every potential competitor with litigation before it had an opportunity to be otherwise caught in its tentacles and leave the competitor without a remedy."

"The trial court found that the unlawful acts of Kobe induced a continual boycott of the Dempsey product and prevented sales by Dempsey and Specialty and caused substantial damage. In questioning the sufficiency of the evidence to sustain the award, two basic principles of the law of damages are presented: 1, the fact of damage must be established with reasonable certainty, Bigelow v. RKO Radio Pictures, Inc.," and other cases.

[278] "The amount of damages may not be based upon mere speculation and conjecture."

"We have no difficulty in determining that there is substantial evidence to sustain the court's finding that Dempsey and Speciality were damaged. Proof of the

attorney fees allowed is not challenged. The item of expenses"—

Then they go on with that, the items.

"The proof of this item was sufficient. As to the amount allowed for loss of sales, the evidence established that Dempsey had in operation an establishment to manufacture his pumps and auxiliary equipment. Specialty had organized a sales corporation headed by an experienced salesman in this type of equipment. He was a former District Sales Manager of Kobe. Salesmen had been employed and there were other competent salesmen available who were qualified in the field
[279] of selling and servicing the Dempsey product. There had been considerable experimental work and testing of the Dempsey pump but it was first introduced to the trade at the Petroleum Exposition in Tulsa late in May of 1948. There was advertising of various types in connection with this introduction. It is undisputed that before and after the Exposition great interest was evidenced in this new product by the leading oil producers in the Mid-Continent Araea. Specialty had called upon about 350 representatives of 40 important oil companies. In the month of June immediately following the oil show, Specialty made three installations"

—and then they go on and recite what they did. They say:

"The expanding market and the interest in the pump almost disappeared following the institution of the litigation and the notice to the trade."

Now, they say further at page 427:

[280] ". . . the fact that petitioner had sustained some damage and the measure of proof necessary to enable the jury to fix the amount. The rule which precludes the recovery of uncertain damages applies to such as

are not the certain result of the wrong, not to those damages which are definitely attributable to the wrong and only uncertain in respect of their amount."

Then it says:

"Complaint is made of the method which the court used in computing the damage. In assessing damages the court used the difference in the sales price of the pumps and their direct cost, finding that the six pumps per month could have been manufactured without additional plants, machinery, tools or other capital requirements. The method used was approved in Bigelow v. RKO Picture Radio Pictures, supra, 327 U. S. at page 263, where it was said, 'the plaintiff sought [281] to show his damage by proof of the difference between the amounts actually realized from his business after the conspiracy became effective, and what, but for the conspiracy, would have been realized by it from sales at reasonable prices, the evidence of which was the amount by which his current prices were higher before the conspiracy than after, and by the extent to which the value of plaintiff's business property had declined after the conspiracy had begun to operate.'

"The losses by Specialty were computed at its contract price and were directly contingent upon the loss of sales of Dempsey."

Now, that was done by—the officials of the company, as to what they could have done if they hadn't been precluded by this wrongful activity.

[282] Now, we don't even have a case where there wasn't a demand, as there was in the Kobe case.

The evidence in this case shows that there were many demands by Zenith to be licensed in this pool to import their product.

The evidence in this case shows that that pool up there

in Canada was composed of the foreign subsidiaries of Zenith's competitors. They were all making radio sets with the exception of Hazeltine, and Hazeltine being in the conspiracy was charged with anything that anybody else did during the course of it.

But, by and large, they were using this pool to suppress competition in Canada, and the record here is replete with instances of where they circularized the trade, where they called the retailers in. They had meetings up in Toronto, as your Honor will recall. We had that all by documentary evidence. We had some minutes of those meetings, and how they were called and reports back and forth of what the pool was doing to protect Canadians from foreign competition in radio sets and television by using the threat of patent litigation against distributors, retailers and [283] other people in the trade.

Now, that all flowed out of an agreement between competitors under which they agreed not to license competitors who were bringing in sets made in the United States. And there isn't any question about it, it is all spelled out in the documents and there was never the slightest question in anybody's mind that that was done by virtue of a conspiracy and that it continued.

In 1958—I read to your Honor a circularization to the trade, the threat of patent litigation, and Mr. Wright wrote a letter up to McConnell, the head of the pool, and told him this was damaging Zenith's business. He wanted it stopped. He had thought that after we had reach agreement with General Electric and RCA that our problems would cease, but they hadn't and he wanted this stopped. And he wanted a reply to his letter and he got no reply.

Well, the next thing that happened, and Mr. Wright testified that our distributors were complaining, our distributors were having difficulty in placing the sets, that our distributors were met with a threat everywhere of

[284] litigation, and he said that under the Canadian law—there is no dispute to this evidence, it all went in without objection—that the sets would be confisticated under the Canadian patent laws. And he drew a perfect picture of what was happening up there, showing that any business man in his right mind could not afford to spend the money and the funds to do the kind of a job with the Canadian market that was being done here, and he said that they didn't do it for only one reason, because of the activity of the pool. And there is no contravening evidence to that in this record at all and no cross-examination on the point.

[285] I don't need to advert anymore, I think, to Mr. Wright's testimony. He was very thorough about it and he told how we computed the damages, that we were first in television, second or third in radio at that time, that he had transposed the markets of the one country to another and the results, that the competition was comparable, that the prices were much higher in Canada than they were here, and that the sets produced by Zenith were of better quality, better styling, and that they could compete against the same competition they had here. And there was very little difference in the competition and the programs across the line, the advertising across the line. All of that was background testimony to his competency, and he wasn't objected to as an incompetent witness, no such objection in this record. And his conclusions follow the Bigelow case as to the computation of the damages and showed that this thing was continuing long after the release that has been talked about here and right down into current times.

[286] Now, what happened after that, after Mr. Wright had taken this up with Mr. McConnell? Our distributor wrote us and said that they had been importuned by the pool and the pool wanted diagrams and wanted to

see the sets that we were selling to see whether or not they violated any of their patents in the pool. And we gave them the diagrams and they examined them and then Mr. McConnell came down here in 1959, June, I believe, while this lawsuit was pending, and he told Mr. Crotty that we were infringing on pool patents and that he wanted it stopped and that we couldn't have a license to import, we had to manufacture up there. And there was some discussion of how that could be done, and he sent a further letter with their form of license, their current license, which is in the record in this case, which shows that they did not permit importation. And at that time this case was pending, and in this case and a part of it—well, it was the whole day, the assertion against Zenith of a Hazeltine patent, the counterpart of which is in the Canadian pool. And the background was that here were members of that pool who had paid us, as I told your Honor [287] yesterday, the equivalent of some forty-five million dollars for past damages who obviously would welcome a chance to get their own back if it came, and here was a litigation which was going to establish the validity or invalidity of one of the patents the counterpart was in that pool. And I told your Honor at the trial that if we lost this lawsuit, so far as Canada was concerned, we were dead. And I think that I told your Honor that we could almost hear the rustle of the wings of the buzzards that sat and waited to see what was going to happen to Zenith so they could pounce on the carcass up there and take what business we had established away from us. And there was noting theoretical and there was nothing conjectural about it, we were engaged in a battle for our life in Canada and we still are.

[288] Now, what next happened?

Our distributor wrote us and sent us a letter that one of their other distributors handling Motorola products

had received. This is in evidence without any objection. This is from Canadian Radio Patents, Ltd., May 17, 1962.

Now, was the pool still operating or not? Counsel would have you believe that it wasn't operating, everything died somewhere back prior to the time we are talking about in this lawsuit. They weren't active any more. I suppose that is the assumption.

Well, the assumption under the law is exactly the other way, that once a conspiracy to control an industry starts, it continues until its object is achieved, and anybody in it has to show that they got out of it. And, parenthetically, not only did Mr. Dodds tell your Honor that he was not getting out of it, was staying in it, but he told your Honor the reason that he was staying in it was that that way he could get more bucks for Hazeltine. Well, that usually is the motive of most wrongdoing, is to get more bucks for the fellow violating the law, and he was frank enough [289] to tell you that was his motive.

All right, here is the letter. It went to Electrical Distributors, Ltd., who were handling radio products, Canadian Radio Patents, Ltd., Toronto, May 17, 1962:

"Dear Sirs:

"We notice from an item appearing in the press that you have been appointed a regional distributor to market in Canada home entertainment products manufactured in the United States and bearing the trade name Motorola.

"Canadian Radio Patents, Ltd. is an agency empowered to license the Canadian electronic patents of such firms as Phillips Electronics Industry, Ltd., Canadian Marconi Company, Northern Electric Company, Ltd., Canadian Westinghouse Company, Ltd., Canadian General Electric Company, Ltd., and Hazeltine Corporation. In addition, we own Parker patent No. 457, 328 entitled 'Television Receiver.'

"Addison Industries, Ltd., and Seabreeze Manufacturing, Ltd., which made Motorola products in Canada [29] was each licensed by Canadian Radio Patents, Ltd. Although we have not, of course, had an opportunity to examine the circuits of any home entertainment products which you intend to market in Canada under your arrangement with Motorola, we would strongly suspect that television receivers would incorporate the inventions, of at least the above-mentioned Parker patent and also Armstrong patent No. 441,777. FM radio receivers would almost certainly use the latter patent also.

[291] "A close analysis of these circuits would probably disclose other inventions covered by patents which we are empowered to license.

"Section 672b of the Canadian Patent Act stipulates that the exclusive rights under a patent shall be deemed to have been abused if the working of the invention was in Canada on a commercial scale and is being prevented or hindered by the importation from abroad of a patented article by the patentee or by persons claiming under it, or by persons directly or indirectly purchasing from him, or by other persons against whom the patentee is not taking or has not taken any proceedings for infringement.

"Subsection 3 of the same Section states it is declared with relation to every paragraph of subsection 2 that for the purpose of determining whether there has [292] been any abuse of the exclusive rights under a patent, it shall be taken that patents for new inventions are granted not only to encourage invention but to secure that new inventions shall be, so far as possible, be worked on a commercial scale in Canada without undue delay.

"From the foregoing you will see that licensing of

imported products which hinder working of patented inventions in Canada on a commercial scale constitutes abuse of the exclusive rights granted under the patent or patents involved.

"Furthermore, such abuse can exist should be patentee or persons claiming under him fail to take action for infringement against an importer into Canada of a patented invention.

"At this point it seems fairly evident that importation of Motorola products incorporating our inventions would hinder the Canadian manufacture on a [293] commercial scale of similar products; accordingly, in order to comply with the intent of the Canadian Patent Act, we would not be prepared to license such imported products with the exception of patents of Canadian General Electric Company Limited, and Canadian Westinghouse Company. These we have been instructed to license irrespective of the country of origin of the patented product. Accordingly, should importation of Motorola products take place, and should these be found to incorporate inventions covered by patents which we are empowered to license other than those of Canadian Westinghouse or C. G. E., we would be forced to place the matter in the hands of our solicitors with instructions to take whatever action they may deem necessary in order to protect our patents. I might point out that we initiated two cases in the Exchequer Court last year, one against a [294] Canadian manufacturer, which was settled before coming to trial, and a second against an importer of German radio receivers. Judgment on the latter case was handed down on May 2 of this year in favor of Canadian Radio Patents Limited.

"In closing, I wish to inform you that we would be

most happy to issue a license to you to make or have made in Canada any equipment coming within the ambit of our patents.

"B. McConnell, President."

That came from our distributors, circularized apparently in the trade and that is where we got it.

[295] Of course, they would and still are—Mr. McConnell said we couldn't have a license, we couldn't have a license unless we manufactured—that is the same as saying we can't have any license.

Now, I am not going to labor the point that that is bound to injure a business.

We get to England, they met year by year to agree not to license.

And we get down to Australia and we had this little flurry about License No. 7, which turns out to be not what counsel says it is at all, but the carrying on of this scheme to cut and prohibit competition from a competitor equipped to compete. Nobody can argue that Zenith is not equipped to compete with any of these companies, and it must be obvious to the court that a scheme and device and a means set up under the fraudulent claim of the Patent Act in Canada, which is shown to be a complete false statement in the court here, nobody can claim that that does not violate our antitrust laws and damage the competitor equipped to compete who cannot compete because of it, maintained by our competitor.

Now, we argued this whole thing backwards and for-

[296] wards. There is a great deal more evidence. The evidence is replete of what was done in England, what was done in Canada along these lines. We have to assume the men that were prominent in the industry, who control the biggest companies in the world in the industry knew what they were doing when they were sitting down to stop im-

ports. They weren't going through a lot of idle motions. A company like Zenith could not afford to have its products confiscated, its distributors and dealers sued, and their trade was stopped, as we have direct testimony on it.

Now, I not only put Mr. Wright on the stand on that. I put Mr. Wright on the stand—and let me say by way of interpolation that if I had not put Mr. Wright on the stand, counsel here would be saying, "Why didn't Mr. McConnell put the president of the company on the stand who knows what the company is doing? Why put some little fellow on?" I have heard that so many times. You put the little fellow—

The Court: You have done it yourself and so have I.

Mr. McConnell: I offered Mr. Kaplan as a witness and Mr. Dodds didn't want him. I am reading from [297] 809 of the transcript:

> "Mr. Dodds: Your Honor, I object to this line of testimony. It is duplicative of what Mr. Wright testified in addition to this bulk exhibit of some 75 letters of correspondence indicating their problems."

That was showing where the dealers were riding us and saying that they can't do this, they can't get their products sold in the face of the pool.

He says:

> "I am perfectely willing to stipulate that Zenith has had problems in exporting their radio and television receivers to Canada."

We didn't make any television receivers until the latter part of '58 and '59.

The Court: You mean '48 or '49.

Mr. McConnell: '48 or '49.

The Court: You said '58.

Mr. McConnell: I am sorry.

I have labored on this with your Honor, probably unnecessarily. The court has heard the case, saw the [298] witnesses, could test the credibility of the witnesses.

The courts of appeal say determination of the value of testimony is a matter for the trial court, peculiarly within the province of the trial court; who was telling the truth, who was falsifying in this case has been determined by your Honor.

[299] Now, I am going to leave technical questions of this case to the overall situation. We have heard about the equities in this case and we have heard a plea of sympathy, or a plea of some kind, that the judgment should not be entered against this particular defendant, that Zenith is a large company and attempting to strangle this little person.

Well, now, your Honor is not expected to come on the bench bereft of all knowledge of human affairs. Zenith is a company, as your Honor must know, that started out as a little ham operator station out here on the near north side, and through the years, under the leadership of Commander MacDonald, and later years with Mr. Wright and Mr. Kaplan, has achieved a first position in an industry which is highly competitive, and they have done it, obviously, by producing a fine product which they have always sold in competition.

The record will be searched in vain for any whisper or suspicion that Zenith has achieved its standing by any predatory methods. It has achieved it by the finest ethical standards and ideals of American industry, and it is [300] where it is because it ought to be there. Our opponent has been in every pool which we have been able to uncover all over the world. They may have some government business, but by and large, their business is in licensing through pools, because they can get more money that way, and those pools are shown by this record to be illegal.

The only conclusion I can draw from this record, or that anyone can draw from this record, is that the business of the Hazeltine Company is primarily violation of the antitrust laws, and they have been engaged in it for many, many years, and they have told your Honor, almost as a dare, that they are going to continue it.

Now, the only reason I advert to this is because the strange and novel doctrine has been advanced in this court and in the brief that if a company acheives success honestly, lawfully, that it cannot recover damages from somebody that is smaller or, in the converse of that, that if it can be shown that the net worth of a defendant is less than the record shows, why, then no judgment can be entered against that.

Now, I have heard some ridiculous propositions in [301] my life, but I think that one steps right to the head of the class.

One more point and then I am through.

[302] The Court: Well, as I understand this treble damage thing, it is for the purpose of helping enforce the law and be a warning. I wonder if they had in mind the total destruction of a company by the size of the triple damage verdict.

Mr. McConnell: Well, there is no evidence that anybody is going to be totally destroyed in this case, far from it. What it will do, is will stop them in their illegal activities here.

The Court: I mean, if it puts them out of business, it will stop them. There is no question about that.

Mr. McConnell: Well, if it puts them out of business, but it isn't going to put them out of business, all it is doing is recompensing somebody that they have damaged throughout this time.

Now, the theory of treble damage is to enforce the rights

of the public, and it is written into the law by the Congress. There is nothing discretionary about that.

The Court: I understand that.

Mr. McConnell: Which leads me to my final point; we are dealing here not only with the rights of individual [303] litigants, we are dealing here with large and important public interest; they go back into antiquity, these interests, the right to move one's products in the course of trade. Our law comes from English common law. If you go back to the year books you will find the law of the King's highway where anybody who interfered with trade on that highway became an outlaw and anybody could kill them, anybody could deal with them without trial or other way because there was such a large, important public interest in keeping these highways free from highwaymen or restraints or anything else of the kind.

Here we have this defendant sitting at the crossroads of trade all over the world with the largest companies in the world stopping that trade in which this country, in which our industry has a very, very large public interest. In the determination of this case, this Court has enforced and given new life to that principle so that not only by this judgment had the rights of Zenith been recog- [304] nized and handled in accordance with the law, but large public interests have been vindicated as well.

This company can pay the judgment, but it is not encumbent upon me to show to your Honor that a judgment we obtained here can be collected. This company is continuously violating these laws which we have sought to have vindicated here.

Now, counsel on the other side have worked assiduously and with some staff, I imagine, trying to dredge up and find anything, anything at all that could be utilized to upset this result and the findings and conclusions of your Honor. They have blamed it on poor old Dodds and everybody is

a scapegoat, and it apparently never has occurred to them that irrespective of the merits of counsel or whether they presented their case well or poorly or whether the defendant counter-claimants case was presented well or poorly, or how it was presented, that this Court might have reached a just and correct result. I submit that your Honor has done that. I submit that in spite of the cant and [305] cavil of my opponents, this case can be affirmed and will be affirmed on appeal.

[306] Now, your Honor remarked that there must be an end of litigation somewhere. Nobody but a company like Zenith could even afford a litigation like this and counsel wants to keep it going on and on and on, and something new presented here, there, hither and yon. He comes in here with a Western Union telegram—now, the mountain has labored and labored and brought forth a mouse.

He said we couldn't import into England and he gets this telegram which he waves around here in court, and he says, "From the 8th of June, 1959, specific import license for the domestic radio receivers and gramaphones were no longer required." I think that is about four, five days of the damage period that would be cut off. And we have evidence that we were exporting some radios to England prior to that time in this record. I don't understand this case—this is from McDermott, Will & Emery. They have been in the case all the time. Now, there is a last-minute movement to dredge up something, anything.

I submit that your Honor has reached a correct and just conclusion of this case and that these motions [307] should be denied and that the judgment we have tendered should be entered.

Thank you very, very much.

The Court: Mr. Kayser?

Mr. Kayser: I think, your Honor, it might be helpful to get back to the motions that we filed, not the matters

we did not raise. I think it should be pointed out, your Honor, that the only thing, the subject matter, clearly, of the motion we filed in relation to the antitrust counterclaim was the question of the claim for damage. The question of the claim for damage for treble damage, the question of whether Zenith was entitled to receive and had established the fact that it had been damaged in the amount of sixteen million dollars plus during the four-year period from May 22, 1959, to May 22, 1963, and that is all that is there involved.

Now, we talk about outlaws in the forest whom anyone can kill. That, incidentally, was a rather interesting comment. I wonder what possibly that implies. We talk about the great interest of the public in stopping the claimed conspiracies.

Your Honor, we can recognize that unlawful con- [308] spiracies should be stopped, but the question we have here, and solely the question, is this right of Zenith to recover damages for this four-year period.

Now, contrary to what Mr. McConnell has said, we have not in this motion put in issue the question of the legality of any of these pools except—and I will come to this point again—we have pointed out that in the case of Australia there is no restriction on imports, and I think that Mr. McConnell and I have a very sharp difference of opinion as to what the record shows.

Now, another thing, your Honor, that we are not trying here is the question whether or not there was a conspiracy back in the 1950's which was involved in the Zenith-RCA litigation. We are not trying the question of whether or not that conspiracy continued or these pools continued as unlawful pools, if they were, in the 1950's on. We are not trying the question of whether these pools still exist. We are trying solely the question of whether Zenith has been damaged and has shown such damage during the four

years and whether the amount which is claimed here has been shown as damage.

[309] Now, your Honor, that is what is before this court and that is the subject matter of the motions, and I want to go back to that now. I would like to bring these motions —this discussion back to what we have raised, not what we didn't raise or what we might have raised, what we might raise on appeal if there is one, and so on. I want to talk about what we presented to this court.

Now, the first subject I want to talk about, and this is a very grave one so far as this lawsuit is concerned, and so for as the questions of liability and extent of damage is concerned, is this matter of these governmental regulations, embargoes, if you will, in England and in Australia.

This, your Honor, is one of the most important features of this case, and I submit that this is not a matter which can be sloughed aside by the type of comment which Mr. McConnell—his testimony on the subject I characterize it because that's what he was doing—he gave us yesterday.

What did he say?

He says, on page 262:

> "They talk about tariffs, they talk about restric-[310]tions, they talk about all that. That wasn't so, as he stated this morning.
>
> "I took that evidence over there. I know what the evidence was. You could get imports into England even during currency restrictions, by government permit. You had to apply, but that doesn't mean it was an embargo. There was never an embargo—never.
>
> "And the same thing is true down in Australia. You have to apply for a permit, or did up to a certain time. But that doesn't mean that imports are precluded."

Well, your Honor, factually there are, of course, two different—two difficulties as concerns Mr. McConnell's

testimony not under oath, and one is that he is flying in direct conflict with what his president testified in this case when he said that they had determined—and this is at page 1065 or 1066 of the record. This was the question and the answer:

> "Now, do you recall that prior to the settlement talks, the deposition had revealed that during the [311] damage period which we were talking about"—

This is the Zenith-RCA case—

> "because of currency restrictions, no radio or television sets could be imported into England or Australia regardless of the Pool?
>
> "A. There was a period of time in there where there were import regulations based on currency in foreign exchange."

Mr. McConnell leads him through the fact that in their settlement findings they struck claims for those two countries because of these restrictions.

Now, Mr. McConnell this morning now ridicules the fact that we have a telegram, a mere telegram from the Board of Trade of London of the English Government, which says that until June 8, 1959, there could be no imports of radio or television without special permit, and this other document headed, "United Kingdom Embargo," this same gentleman from the Board of Trade has stated that no special permits were issued in commercial quantities, which is what we are talking about here. And then we have this letter from—this note on the phone conference [312] from Australia in which the Australian Board of Trade has said that until February, 1960, there could be no imports except under the limited conditions involved there which Zenith does not come under.

[313] Now, Mr. McConnnell said that what is the meaning of all this. This covers, in the case of England, he says,

three or four days. Actually, it's two weeks, but that's neither here no there—of the damage period. In the case of Australia, this applies to, well, less than a year, but, your Honor, this has major significance on the question of the amount of damage. Putting aside everything else, putting aside the question of fact of damage, putting aside the question of affirmative defenses, putting everything else aside, if it is true as this evidence indicates that Zenith could not have started in England until June, 1959, could not have started in Australia until February, 1960, then it is also obvious that in attempting to measure the extent of the damage which they say they suffered during the four year period, they would have to figure zero as their starting percentage of the market.

They could not do as they have done in this damage proof. They could not, for the four years, claim damage in England for television sets, for example, on the basis [314] of starting point of 4 per cent of the market on television, and a little over 3 per cent of the market on radio. They would have to start from the zero point, not 4 per cent. From zero.

And the same thing is true in Australia. They would have to start from zero because regardless of any claims of the pools, the government would have kept them out and did keep them out if they were even interested, which they were not. So that their starting point on damage could not be up here going across. It would have to be—to start as the zero point and build up, as it built up in Canada.

Now, your Honor, this is of tremendous significance in this case. Because of the $16,238,872 damage which Zenith claims, $9,941,481 represents England and Australia. It represents a computation based on the assumption of this fully matured market. It is based on the assumption of 4 per cent on radio and 3 per cent on television, and 1 per cent plus and 2 per cent plus in Australia. And on the basis of

this information having to do with the governmental re-
[315] strictions, I submit it is quite obvious that every-
thing else aside, that information indicates that this al-
most ten million dollar claim here for these two countries
is very largely unfounded, on that fact alone.

Then your Honor, when you realize you are talking about trebling that, you are talking here about something in the minimum nature of fifteen million dollars which, under any theory, must be improper if, as we believe to be the case, these governmental regulations did apply. So that in any event, if Zenith was interested in those two countries, they had to start from scratch. They would have had to start from scratch in England on June 8, 1959; they would have had to start from scratch in Australia in February of 1960. And, your Honor, this is something which is before this Court, before judgment is to be entered.

[316] We submit that this is in fact the nature of new evidence. But even if it were not, this is a kind of measured thing which, under the cases which are in our memorandum, are considered to be a compelling reason why a case should be reopened. Now, that, your Honor, is my first point.

Secondly, I am very curious as to why Mr. McConnell found it necessary yesterday to bring in the Westmoreland case having to do with the effect of releases, and having to do with the limitations which public policy places on releases. He spent some pages of the record yesterday pointing out to this Court that the whole question of the release in the Zenith-RCA case, which we seek to plead here, is totally irrelevant because, he says—and certainly, as I shall point out, I not only do not deny it, I point it out myself—he points out the case of Westmoreland Asbestos at page 245 of the record, where the Court said that you could not give a release for damages based on future acts in violation of the antitrust laws. You cannot now say

[317] that if I violate the antitrust laws in the future, I am to be released from those acts. We have no question, no quarrel on that whatsoever.

Then he finally says at page 248, he says,

> "All right. So I say there is nothing to the release point."

Well, now, your Honor, what does that have to do with the release which we referred to? What does that have to do with this lawsuit? I pointed out to your Honor in connection with that very matter—I pointed out that the reason we were offering to prove those releases was because it released—or they released the future after effects of acts occurring on or before the date of the release. We pointed out that one of those future after effects which Zenith is now trying to claim here is the fact that those acts are supposed to have interfered with his ability to create this—develop a market from which it could profit during the four year period involved.

And I said this, and I guess Mr. McConnell was here, but I guess—well, he doesn't like to listen to me; I got [318] that impression anyhow. He says:

> "We are not saying, your Honor, not suggesting for a minute that this is any release of any liability on account of any acts in the future."

Your Honor said:

> "Oh, I see."

And then I went on:

> "As a matter of fact, there are cases, and I am sure Mr. McConnell would mention them if I didn't—there are cases which say that if you try to release the effect of a future violation, that is against public policy."

Now, I continue:

> "We are not contending that for this release at all."

And then I went on to say that what we were contending for was the after effect, that there was a release of the after effects of the alleged acts of the alleged conspirators on or before September 27, '57. And I said that since Mr. McConnell claims that we are co-conspirators, [319] we as alleged joint tort-feasors have the benefit of that release.

And yesterday, in answer to a direct question from your Honor, he had to admit that that was the case. So when he says that the release has no relevancy at all because he says it involves an illegal contention, your Honor, he is not speaking the fact. I made no contention of the kind that he sought to deny. I made an entirely different contention, one that is entirely proper. And that release, your Honor, ought to be in this case, and it would have been pleaded if the original counter-claim had been so framed as to make it appropriate.

[320] Now, your Honor, I would like to, since Mr. McConnell has regaled us a great deal with the Zenith-RCA case, and how he brought the great lawyers of New York to their knees—I have no comment on that, but I do have a comment on another case which I think is very instructive. Mr. McConnell took great offense at the idea that we would suggest here that he would actually plead one theory of action and try another. I believe he said he took umbrage at it or something like that.

Well, when we make that suggestion, and we make it not because there is a precedent, we make it because it is the fact—but when we make that suggestion, your Honor, we are not the first one to have made it. Because in the case of Wisconsin Liquor Company versus Park and Tilford Distillers Corporation, the Seventh Circuit accused him of the very same thing.

Now, that also was a treble damage action with some other counts in it, and Mr .Thomas E. McConnell, Mr. Phillip J. Curtis, and Mr. Francis J. McConnell appeared for

the appellant plaintiff. And the [321] first count in that case was a treble damage action, also alleging that Park and Tillford and some others had entered into an illegal conspiracy to monopolize, and damaged Mr. McConnell's client.

Then shortly before trial, he asked leave to file a so-called supplemental complaint, alleging a different conspiracy involving Schenley Industries in a different theory of action, and the defendants objected on the ground that they woud be prejudiced in preparation of their case for trial.

Leave was denied. But, your Honor, that didn't take care of the situation, and I now read from the opinion written by Mr. Justice Hastings. He says:

> "In presenting its case, appellant departed completely from its original allegations charging a conspiracy on the part of Affiliated and Park and Tillford to sell to Bonded Spirits at discriminatory prices and to grant it rebates and discounts and allowances; and [322] instead sought to establish the existence of a conspiracy of which Schenley was allegedly the guiding light," and so on.

And then at the end of the plaintiff's case, Mr. McConnell again, or his office, again sought leave to amend its compliant. This was the second trial—try, rather, to conform the pleading to the evidence, and it was denied.

And the District Court in the Seventh Circuit held that he was limited to the question of whether he had proved the cause of action as pleaded, and held that he had not.

Now, while we are on this case, I think I will sidetrack for a minute to read another brief portion which I believe is appropriate on this question of fact of damage, this damage issue. It is also appropriate because, here again, we have Zenith's counsel. It says:

"The only other evidence on the question of damages was testimony by one of the appellant's officers that during the twelve month period its books showed [323] gross sales of Park and Tillford products amounting to so many dollars. This witness testified that absent interference arising from the breach of contract, appellant would have doubled such sales and profits. This testimony has no support in the record since there is no competent evidence of loss of customers or sales, and could certainly be no basis for the assessment of damages. Loss of profits is a proper measure of damages in Wisconsin, but the evidence must furnish some basis on which profits may be computed with reasonable certainty. Recovery of alleged loss of profits cannot be had on the basis of pure guess work and speculative evidence as to the existence and extent of such losses."

[324] Now, your Honor, I suggest that this language has particularly particular appropriateness as concerns England and as concerns Australia, but also as concerns Canada where we have the statement of the two executives as to what their sales would have been, their loss of profits would have been, and so forth. But although Mr. McConnell promised in his opening statement of this trial to furnish evidence of loss of customers and so forth, he actually didn't furnish one single bit during the four-year damage period.

It is also interesting to note in the Kobe v. Dempsey case, which he read from at great length, that there the court also recited at great length as to all of the concrete evidence that had been put in in that case which justified a finding that there was some damage.

Next, your Honor, I want to switch very briefly to a subject that I think we have talked about at some length

before, and I don't want to belabor it. But I think it might be helpful if I added a couple of additional comments. And this is on the question of whether or not there was notice of the cause of action embodied in [325] the findings.

Now, as I said before, and I think this is a distinction that we must remember, that we are talking here only as to the issue of damages, not as to whether or not there was any allegation of a conspiracy; because the fact of the matter is, of course, there was in this case also a prayer for an injunction, and we haven't raised that point on our motion. We are talking only on the issue of damage and, as I think I said yesterday, that the damage claim obviously is limited as we have described in our chart, and it must be so limited because, if it were not, then Mr. Crotty's affidavit and the motion which counsel filed would not be truthful. But we believe that paragraph 9 of their counterclaim and those affidavits and motions clearly did state and limit the theory as to causal acts, as to period of time, and as to scope of alleged injury.

Now, your Honor has suggested that be that as it may—and whether he agreed up to that point or not I guess only time will tell—be that as it may, certainly there was notice given in the pretrial brief. Mr. McConnell did read [326] yesterday an excerpt from the brief which I don't know whether your Honor realizes it or not, but it was in a footnote at page 46; it wasn't in the text.

Then I would also like to volunteer to Mr. McConnell and advise the court that if you read the brief carefully, he did run in another reference at page 32 which referred to a four-year period. And if somebody was reading this pretrial memo very suspiciously expecting this kind of tactic, that that might have been a tip-off that maybe there was a change. But everything else in that memorandum is perfectly consistent with the counterclaim as pleaded.

And as a matter of fact, if you look at page 27 to 28, you see a reference obviously to damage for domestic conduct; namely, these two acts of pendency and threat; and then you see a reference to injunction in relation to the alleged international conspiracy.

So there, really—unless you look at it from the Monday morning point of view, that pretrial memorandum certainly was no tip-off. And I must tell your Honor I read it a number of times. I read it again last night. In so far as that pretrial memo justifying the switch is concerned, those two features looked at afterwards were the only possible indications.

[327] And, also, Mr. McConnell read yesterday from page 18 of the record, his opening statement, in which he referred to an English pool. The fact of the matter is, if you read the rest of his opening statement, including page 31, and much of the material between 34 and 40, you see again that what he was talking about in relation to damage was perfectly consistent with his original theory. But, your Honor, supposing I'm wrong all along the line on that. Where does that leave the subject matter? The fact is that the pretrial memorandum, or the pretrial brief of Zenith was not served until February 11, 1964, or some six days, including the weekend, before the opening of trial. It was served obviously in the last minute pretrial flurry of getting ready. And then, of course, the opening statement was at the very beginning of the trial.

So whether or not, your Honor, this be considered notice of a kind, I think we have a very serious question. Is this the kind of notice which is adequate as a matter of due process to enable a defendant to consider whether or not the theory gives him a chance, or rather raises [328] the possibility of new defenses? Would this be the kind of notice which Mr. Dodds should have to consider, whether

or not there was a matter of a release, or a matter of a statute of limitations?

And one step further, your Honor, at best this information did not indicate in any way that Zenith proposed to do as it in fact did on acts which occurred prior to the four year period. It did not notify them. It could not notify them that Zenith intended to rely as in fact it did on acts occurring prior to and which would be barred by the releases.

So even if he had a kind of notice, it is not the kind of notice, particularly in the last minutes before trial, which would give him the chance to do what he would normally do if he had had a pleading put before him in the normal time to consider and to answer.

Now, Mr. McConnell yesterday volunteered not only that he didn't like Mr. Dodds, but that his affidavit was a falsification. Now, I submit that regardless of the theory which Mr. McConnell says Mr. Dodds used in defending [329] against the counter-claim, it must be quite obvious that if Mr. Dodds had realized exactly what it is that Mr. McConnell proposed to prove and rely on, he certainly would have pleaded the statute of limitations, and he most certainly would have pleaded the releases. Because Mr. Dodds himself—he didn't have the releases, but the documents which Mr. Dodds put in, particularly Plaintiff's Exhibit 48, I think it was, was the settlement agreement between counsel in the Zenith-RCA case which specifically said that releases would be given.

Now, if Mr. Dodds had not been surprised, had not been unaware of what was happening to him, I suggest that these defenses would have appeared and I suggest that Hazeltine should now be allowed to raise them for the reason, among others, that Mr. Dodds did not have an adequate notice of what Zenith's final cause of action was to be.

And I will get, a little later, to this question of the notion that the statute of limitations—that the right to [330] plead it has been waived.

The Court: Maybe we will take our morning recess now.

(Whereupon, a short recess was taken, after which the following further proceedings were had herein:)

The Court: You may proceed.

Mr. Kayser: Your Honor, we come now to this subject of statute of limitations on which Mr. McConnell dwelled at quite some length yesterday. And again we were told about the conspiracy back in the '50's, and that it had continued, and then Mr. McConnell did what I think is a quite curious thing. He quoted to your Honor from U. S. vs. Kissel and U. S. vs. Hyde, both of which were criminal cases involving the United States. They were not treble damage cases.

[331] Then he made the comment—if you will pardon me, I don't have á ready reference here—he made the comment to the effect, he says there isn't a case in the books, not one, which holds that a continuing conspiracy can be barred or sanctified or made legal by a statute of limitations. Well, that is very interesting, and that is very true, but it doesn't have a blessed thing to do with this lawsuit.

Now, it is true, of course, that there are these cases which he refers to, which say that if you are in a conspiracy, you have the burden to show that you got out. And it is also clearly true that there is no statute of limitations which, at least in the same context as in the treble damage cases, which bars prosecution criminally or as concerns an injunction by reason of statute of limitations. There is an entirely different rule of conspiracy, an overt act, and so forth, but it doesn't have a thing to do with the question of an action for treble damages. It doesn't have a thing

to do with a question of statute of limitations in connection with an action for damages.

Now, I would like, your Honor, to try to set the [332] record straight once and for all on this.

Your Honor, excuse me. I am having some trouble finding the material I wish to use.

The Court: Take your time, take you time. Don't be concerned.

Mr. Kayser: I am sorry. I have it here—to read from the Seventh Circuit case of Baldwin v. Loew's, Incorporated, which was decided in this circuit January 16, 1963, which is 312 F. 2d 387. And I shall read from page 390.

Now, Mr. McConnell doesn't say so expressly when you read the record very carefully, which it is obvious he is trying to create the impression that there is no such thing as a statute of limitations in a continuing conspiracy involving a treble damage action; that there is no statute of limitations where treble damage claims are concerned.

The Court: You do agree that the statute of limitations can be waived. You agree to that, don't you?

Mr. Kayser: Yes, but I shall come to that in a moment, sir.

What does the Seventh Circuit say?

[333] "Where one has been injured by a civil conspiracy a statute of limitations begins to run at the time that injury is inflicted."

And then—this case here involved a lease. I won't read that portion.

Then it goes on, citing from the Steiner case in 232 F. 2d at 195:

> "In a continuing conspiracy causing continuing damage without further overt acts, the statute of limitations runs, as we have noted, from the time the blow which caused the damage was struck. Any

> further internal injury affects the problem of how much should be claimed in damages, not the problem of when the statute of limitations commences to run."

Then, going on:

> "In Momand v. Universal Film Exchanges, First Circuit, 172 F. 2d 37, at 49, the court held that the rule of criminal antitrust actions that a statute of limitations does not begin to run until the last overt [334] act performed in compliance with the original conspiracy has been accomplished does not apply to a civil action."

So, again, your Honor, we have been treated to some lessons in law here, but not to lessons in law which relate to the subject matter which is before this court.

[335] We do not claim that the statute of limitations is a method of sanctifying an unlawful act. Nothing of the kind. We claim merely that the statute of limitations operates to bar the damage action, except to the extent that acts—that the damage results from acts which occurred within the four-year period. And we contend that no such acts are shown.

We further say, of course, that even if aggressive acts are shown, there still is no cause of action for damages unless it can be shown that damage did in fact occur. It is like that automobile case we were talking about yesterday where the cars collide, but the second car cannot show that he as much as got his paint scratched.

Now, what Mr. McConnell is really trying to sell this court is the idea that if he can show that these pools continued after 1957 and, as he defines the pools, yes, yes, they did. There is no question about it, that these arrangements in relation to patents—that characterized necessarily as he characterizes them, but that these arrangements have

continued and, so far as I know, are in existence today. [336] There is no question about that.

The question is, was Zenith hurt within the four-year period, and was damage suffered within the four-year period. And we say, your Honor, that on this record this is not shown.

Now, he cited a couple of more cases on damage and demand and so forth. One of the cases, the Congress Hotel —or the Congress case that he cited, actually doesn't stand for what he says it does, because there the question of demand was whether or not the landlord should make the demand. It wasn't a question of demand by the tenant who was operating the theatre and would get the picture or not get the picture. It was the question of demand by the landlord whose rent was affected, but who obviously not being in the movie business was in no position to make a demand. Enough for that.

Now, I would like to digress just a minute when we are talking about damage, to one subject matter that Mr. McConnell—although he talked a great deal about Canada, one subject which he completely ignored was the question of Zenith's annual reports and what they showed and don't show. And I can understand why he chooses to ignore [337] them because, as we pointed out, they did show that after the settlement, Zenith went expeditiously into Canada, and it did do well until the Canadian tariff hit them. And these reports also showed that despite the fact that Zenith reported extremely in great detail to all of its shareholders about all the problems they were having, including previous problems from so-called cartels, including tariffs, exports, foreign competition, Japanese low prices, and so forth, that there was quite strangely not one word mixed in with the glowing talk about what they were doing in Canada. Their report to their shareholders was very, very glowing and optimistic until the tariff hit. And

there wasn't one word in there which indicated that they were being impeded in any way.

Now, of course, Mr. McConnell did say that allegedly but for the pools they would have done a great deal better, but I suggest that it is a flight from reality to assume or to say that but for the pools, they would have had between late '58 and June, '59 the same share of the Canadian market as they had achieved in this country in ten years in television, and thirty-five years in radio.

[338] That again is dealing in "maybe so's" and abstractions but, your Honor, it is a complete divorcement from facts, which is what we must consider here, and the best evidence of what happened in Canada is what was said and what was not said in their annual reports.

Now, you Honor asked this question of statute of limitations and was there a waiver.

Now, on that, as I think I have said a number of times, that one of the most serious consequences which have resulted from the failure to plead the cause of action which was proved had to do with these affirmative defenses of release and limitations, and Mr. McConnell has suggested that, "Well, that is tough. Al Capone raised it and he couldn't get anywhere with it and we can't either," and then he brought in another Fawcett Publications case this morning.

But I suggest that there is a case in this circuit, and a treble damage antitrust case, which contradicts Mr. McConnell, and that is the Emich Motors case, Emich Motors Corporation v. General Motors Corp., Seventh Circuit, January 27, 1956, which is 229 F. 2d 714.

[339] In that case, your Honor—this is a treble damage action involving the question of a continuing conspiracy—the statute of limitations was not pleaded at the trial and plaintiff got a judgment of something over $1,200,000.

The case went up on appeal and finally the Supreme

Court of the United States, based on some errors, sent it back for a new trial.

Now, at that time General Motors, for the first time, wanted to interpose the statute of limitations and the plaintiff counsel said exactly what Zenith's counsel says here, "Well, that is tough. You can't do it. You have waived it."

Well, now, what were the facts in that case?

The facts were that the statute in question, which they then pleaded before the federal statute was amended, was a two-year Illinois statute of limitations. That was the statute that was involved, and at the time of the original pleading there was no authority as to whether or not the statute applied, and there were a couple of hints that maybe it didn't.

Accordingly, General Motors did not plead the [340] statute at that time and then later, in the interim, the Supreme Court came down with a decision which indicated that it did apply; so that at that point General Motors sought to plead the statute. And they were allowed to do so. They were allowed to do so because of the particular circumstances that were involved, and the Seventh Circuit, in holding that this was proper, said:

> "It is well settled that a defendant who desires to avail himself of a statute of limitations as a defense must raise the question either in the pleading or on the trial or before judgment."

Now, I am not suggesting, I am not even—I don't think it is relevant as to whether or not a defendant normally has a right to wait to interpose the statute of limitations, but I do suggest with just as much force as I possibly can that this is a case where the right to interpose the statute of limitations should be recognized. The counterclaim as pleaded would have made the interposition of the statute of limitations at that time, the release at that time,

it would have been ridiculous, because the alleged [341] acts causing damage and the alleged period of damage all was less than—both was less than four years. As a matter of fact, it was about two years. There would have been no reason on God's green earth to impose either, and certainly, if it be assumed that the pretrial brief or the opening statement or something of that type should have tipped off Mr. Dodds and should have sent him to the books and should have sent him investigating the release, certainly he did not have an adequate opportunity, and that opportunity which would have amounted to due process to investigate and interpose those defenses.

[342] And I say, your Honor, that we are clearly within the rule, the permission laid down by Emick case as clearly as any defendant or counter-defendant could possibly be.

Now, I would like to come to another point which Mr. McConnell raised, and that is the matter of this license form No. 7 in Australia, where I gather I am being accused of less than complete frankness. Mr. McConnell discussed this subject at, I believe beginning page 248 of the record. He pulled out a copy of license No. 7 as to which we made an offer of proof to show that the prohibition against imports and exports under the patents were not in license No. 7 as it was not in license No. 6. He pulled that out, and what did he read to the Court? He read to the Court from paragraph 4b of license form No. 7, which has to do with the patent marking which has to be put on the set which says that the instrument, the radio or television set was manufactured under a license granted by Australian Radio Technical Services and Patent Company, et cetera. [343] There he says that proves that Hazeltine's counsel is lying to the Court, that there in fact is a restriction, that in fact you must manufacture in Australia.

Well, now, your Honor, this is nothing more than a routine marking to show that your device is covered by—

is licensed under the patents. This instrument was manufactured under a license that could read—and Mr. McConnell will make big significance of this—this could read, "Was sold under a license or was manufactured for sale under a license or is used under a license." But I submit that for Mr. McConnell to attempt to draw a conclusion and to attempt to collect two million dollars on the basis of that one word is going pretty far, and I shall tell your Honor why it is going pretty far.

Now, as we explained, the whole number licenses are the ones Zenith could get and the B licenses, 7B, 6B, and so forth, were the licenses which according to this record are given to local assemblers. Now, what was it, your [344] Honor—and don't forget that Mr. McConnell had all this material, or earlier editions when he made his findings here or proposed them. Your Honor, I am getting inundated in my own papers here.

The Court: That has happened before me before and it has happened to me before.

Mr. Kayser: What was it that Mr. McConnell complained of and what was it that he characterizes may be illegal restrictive operation of the Australian pool which gave him his claim for two million dollars damages? He says that the Australian pool—that for over thirty-five years they have had a form of license agreement, the only form issued by the pool, a standard package license agreement not referring to any particular patent or invention, but to all of the rights of all of the conspiring parties. And then he says that a standard pool license imposes the restrictions necessary to effectuate the division of territories involved in the overall arrangements. Then he goes on, and this is the significant part, he says:

[345] "It requires the licensee to agree not to export or import or sell or offer for sale in Australia any

radio or television receiving apparatus not manufactured in Australia."

[346] Now, your Honor, where did he get that language? Where did he get it? Did he get it out of this paragraph which he comes up and reads to your Honor yesterday as being a restrictive provision? That same provision was in License No. 6 which was in this case. Is that where he got that language? Your Honor, it is not. That language is a direct paraphrase out of License Form 7B, 6B, 5B, and so forth, which the local assemblers license, because paragraph 4A and -B of the 7B license reads:

"The licensee agrees with the grantor as follows; not without the previous written consent of the grantor to sell, to export or sell for export or knowingly permit to be exported any broadcast sound-receiving apparatus or radio gramaphone, not without the previous written consent of the grantor to sell or hire or offer or expose for sale or hire in the territory for which this license is granted any broadcast sound-receiving apparatus or television receiving apparatus or radio [341] gramaphones which have not been manufactured in the territory which this license is granted."

There, your Honor, is the prohibition which he refers to against exporting or importing, and that is what he relied on in his findings, and that is in 7B and 6B, and so forth.

Now, as concerns this marking paragraph he referred to, and is this an obscure way of saying something. Well, the fact of the matter is, your Honor, that up in the early license agreements prior to 1951 this same 4A and -B, which I have just been reading out of the 7 Form, that was in the whole number forms. That was there expressly and clearly and the obvious purpose of striking it was to strike it. If they still wanted the provision, they would have left it

there as they left it in 7B, but they struck it and it is no longer there.

[348] And further, your Honor, in view of the fact that we have almost two million dollars liability claimed in Australia, the idea that because counsel here wants to construe one word to have an ulterior meaning when the record itself, the intention of the parties is clear, your Honor, I say again that this is a flight from reality. It's one thing to concoct a legal theory as one lawyer to another, possibly, but it is another thing to try to collect two million dollars on a construction of a word, particularly when that construction is in conflict with the rest of the record.

Now, the next subject I want to come to is the matter of Exhibit 218.

Mr. McConnell did a great deal of what I would call peripheral defense of it and took me to task because I didn't like its form. And if I was unduly critical about the penmanship or so forth, I apologize, but I refer to that only as being indicative of the circumstances under which it was prepared. But what did Mr. McConnell say about the contents of the exhibit itself? The only thing that he made any reference to at all, and he ridiculed it, [349] was the reference by Ernst & Ernst to this question of profit-sharing. And he tried to dispose of all of the questions about Exhibit 218 on the basis of that reference.

Well, now, your Honor, if you take a look at the Ernst & Ernst report comment on the profiting-sharing at page 21 of their report, all they say is that some questions occur, some possible inconsistencies, and being sound accountants they attempted no conclusion on that point because, they say, the effect, if any, of this inconsistency on the final claim figures cannot be determined since it is not clear as to whether the Canadian profit and loss figures used in Schedules 10, 10A, 11 and 12 included profit sharing. Being

careful, cautious people as they are, not here to try to twist something, but to attempt to determine the facts, they have raised a question on the profit sharing and they have said that the final determination as to the facts in relation to profit sharing cannot be determined because they do not have sufficient information.

In any event, your Honor, that is all the comment that Mr. McConnell cared to, or I think probably dared to [350] give concerning Exhibit 218, because, your Honor, what did Mr. McConnell have to say about the fact that Exhibit 218 claims nine million dollars loss of profit in England on the basis of Canadian prices rather than English prices, whereas English prices, if used, would have caused them to lose eleven million dollars in four years from that business. What did he have to say? He had to say absolutely nothing, even though this made this indication of a twenty million dollar difference as concerns England alone. In fact, the indication was that there would be an eleven million dollar loss rather than a nine million dollar profit, and even though there is a certain element of uncertainty there, because Zenith says it could get more than the English manufacturer and so forth, but the basic question, the basic flaw, the basic uncertainty, the basic untrustworthiness of this Exhibit 218 is reflected in that one point alone, and Mr. McConnell did not even mention it.

Now, what does he have to say about the question which Ernst & Ernst raised in great detail as to the odd way these hypothetical profits were apparently increased by the [351] treatment of the cost figures of this matter of fixed cost. What did he have to say?

Well, he made—I suppose this is included in his general comment, that an accountant can prove anything with any set of figures.

Well, I think, your Honor, I think after looking at this exhibit that that is possibly a pretty accurate statement.

But this report shows careful consideration by Ernst & Ernst. I venture to say that they spent a great deal longer in analyzing this exhibit than was spent in making it. I venture to say that that is true because there are so many defects and flaws here.

[352] The Court: And perhaps more time than your prior auditor Oscar Anderson and Company spent on it.

Mr. Kayser: Yes, that is right. Of course, he also had a shorter time.

What does Mr. McConnell have to say about the question of Zenith's share of the U. S. market, the failure to include imports in that share? What does he have to say about that again? Nothing. As I say, he tried to dismiss the Exhibit with the minimum of attention. Now, this is a small matter, but he did say, I believe, not entirely accurately, that Mr. Dodds raised no—approved the Exhibit and that it was fine with him.

Now, I recognize that no objection was made at the trial. I recognize, your Honor, that you asked him if he had any objection and he said that he did not. That is clear in the record. But for complete accuracy, so far as saying that Mr. Dodds had approved this, he did say in his post trial brief, he did talk about this Exhibit in an attempt to attack it for several pages and then he said, on the whole, the hypothetical figures of DX 218 and 220, which are [353] part of it, simply are unreliable.

Now, I can certainly agree that this whole matter should have been pursued with a great deal more vigor than it was, but I do think it is fair to point out that he did not, in fact, approve it.

Well, your Honor, I am coming to the conclusion. It is to be expected the Court may have some conclusionary remarks to make.

Now, we have talked a great deal the last two days on this question of surprise and change of theory. I think I

reviewed at some length with your Honor yesterday the question of relative delay and relative culpability. I suggested to your Honor that even though Hazeltine's counsel possibly could have done a somewhat better job, that the delay which it caused was by no means as great as the delay in Zenith in not having pleaded this so-called action back in April of 1960 when it could, and that there was also—that there was greater culpability on the part of Zenith in having slipped in this theory without actually [354] having amended the pleading. And, again, I am talking about the theory, the claim for damage and that alone.

But entirely aside, and casting aside all those things for the moment, we are here, your Honor, before this Court, before judgment has been entered, we are before the Court which has the power to rectify these things which have occurred and which have been done. We are before this Court saying to his Honor that if these things are allowed to stand and regardless of culpability, diligence or what, that if this judgment is entered this is, in fact, as Mr. McConnell has put it, like a death sentence. Now, your Honor, we, of course, appreciate consideration from the Court. We appreciate these are matters of discretion, but we believe, your Honor, that basically the question of whether the judgment can be entered on the face—on the basis of what is before your Honor, we believe this is a matter of legal propriety. We raise the question, can a judgment properly be entered when your Honor is [355] apprised of the existence and the desire of Hazeltine to plead the defense of release of joint tortfeasor which would bar a very substantial portion if not all of this claim? Is it proper for your Honor to enter judgment realizing that we have a wish to plead the matter of the statute of limitations, which we again believe will bar all or substantially all of the claimed recovery. Is this proper for this

Court to enter this judgment realizing that there is this serious question, assuming there is a doubt, that there is still this serious question as to the existence and the effect of these embargoes in England and in Australia which not only discredit the theory under which Zenith hopes to collect all the damage which it seeks here, but in the case of Australia, your Honor, even absolutely bars the damage for almost one year, and bars a small portion in England. But basically can this Court award nine million dollars in England, for example, and treble it realizing that that damage is based on the theory of a developed market when in fact by reason of these legal impedi- [356] ments Zenith would have had to start from scratch in June of 1959.

[357] And can the judgment be entered as concerns Canada, realizing the devastating admissions of stress and by silence in the annual reports in which Zenith presumably speaks freely and frankly and honestly to its shareholders? Can a judgment which is based, which is in direct conflict with that information and those admissions—can that properly be entered and can it stand? And can a judgment stand, your Honor, based as to the amount of damage on this Exhibit 218 which is so full of major flaws and unanswered questions? Is it enough to say that an accountant can make anything out of a set of figures? Isn't it quite apparent that that exhibit is not trustworthy and cannot do the job.

So, we say, your Honor, that the question that we have here is one of propriety and one of law, as well as a question of consideration, we respectfully request of this court —namely, whether in the light of these circumstances, and whether in the light of all the other circumstances that have been brought out in our motions, memoranda, and oral argument, whether this court can properly enter the judg- [358] ment pursuant to these findings and conclusions.

Now, your Honor, if I may, I would for the sake of the record like to make a couple of oral motions.

First, in view of the fact that the question has been raised as to whether or not the cause of action for damages stated in the findings was in fact disclosed and pleaded, I would like to ask leave at this time to file within a short date our affirmative defenses as a formal pleading of release and statute of limitations.

And also, your Honor, I would like again, to complete the record, to move at this time that the counterclaim as pleaded be dismissed for lack of proof, and that the counterclaim as embodied in the findings be dismissed for lack of proof and by reason of the bars of the statute of limitations and the releases.

Thank you, your Honor. I have very much appreciated your courtesy and your vast patience in listening to me. This is a matter of vital importance to the client, and if I have transgressed either on your Honor's time or in any other respect, I am sorry. But I do appreciate very [359] much the consideration that you have given me and the client.

The Court: Mr. McConnell, do you care to address yourself very briefly to those two motions he just made? You will be limited to that.

Mr. Kayser: Sir?

The Court: Mr. McConnell—the ones that have to do with seeking to file these new pleadings on the statute of limitations.

Mr. McConnell: Well, the statute of limitations—this case is clearly distinguishable from the Emich case—

The Court: All he is doing is asking leave to file, and that is the only thing I wish to have you address yourself to.

Mr. McConnell: I think it's too late. He can make it for the record, but to actually file them in this case, the record is made. The case has been closed.

[360] The Court: Well, the record will show that leave is given to file them at this time, after proofs are closed and after findings have been made.

Let me say that as far as the Court is concerned, that this has been perhaps the most gratifying two days that I have spent on the bench since I have been here. It is not often that I have before me men of the stature of those who have argued on behalf of their respective clients for the last two days.

You may say to what you have designated as the first team that had the first team been here, he could have done no better than the second team did. And I think I know enough to appraise that.

The Court at this time is prepared to enter the final judgment and decree offered with the exception of the eight numbered figure in paragraph two. The Court feels that in regard to a very limited degree, that perhaps there should be further proof solely on these two questions—the questions of the damages in regard to Australia and the damages in regard to England.

In regard to Canada, there will be no change as far as the Court is concerned. I feel that counsel [361] should have an opportunity to offer what proof he can adduce in support of the statements made here and the offers of proof made. And it will be limited to this, let me assure you. As to whether or not radios and televisions could have been imported into England and Canada in commercial quantities prior to the start of the damage period. And in the event it is established that they could not, I would think it would require a readjustment into the percentage figure of the market.

We are not going to go into 218 and contest the figures

that were offered at the time of the trial as to their authenticity or their credibility. I can see no need of any further discovery in regard to the limited proof that I will permit. I will not permit CPA's, regardless of what firm they are from, to attack the figures that have been offered other than in regard—and not perhaps even from them—as to whether in the event the cartels or pools themselves were not the proximate cause of imports into Australia and England prior to the time the damage period starts.

There could be some testimony as to whether the percentage of the market claimed under those [362] circumstances, if that is shown to be the fact, whether the percentage figures should be as high as they are. But this is not going to be a field day for accountants going into 218 in regard to the reliability of the figures offered on the profit and loss angle. It can result only perhaps in the diminution of the percentage figure for the four-year period if Zenith was unable to, because of the law of England and Australia involving currency restrictions, to sell and establish a market.

For that reason, as I say, there may be a switch in the numbers in finding 36, the ultimate numbers. None in regard to Canada, and only to the limited extent that I have indicated from the bench today in regard to Australia and England.

Whether Mr. McConnell and his client want a partial judgment and decree in regard to all of the other aspects of the proffered final judgment and decree other than the six figure number contained therein, if he decides in the affirmative I will sign such a partial judgment and decree. But I do feel that in order to satisfy myself, in order to do equity in this matter, that I would like, to the limited extent expressed, a reopening in regard to the matters that I have indicated that do trouble me [363] by virtue of the offers of proof that have been made and the

statements that have been made in regard solely to Australia and England.

And I would suggest that since this involves overseas matters, that we set this hearing for Tuesday, June 1st. That should be ample time to get what is concerned here from the sources from whence it must come.

Yes, Mr. McConnell.

Mr. McConnell: May it please the Court, under the rules of this court, it is possible to enter a judgment on that portion of the case which has been adjudicated and, under those rules, the Court can designate that as subject to appeal.

At this time, I would like to enter a motion that the decree and judgment insofar as it concerns Canada be entered, and that the Court reserve jurisdiction for the issues comprised, as your Honor stated them, in the fixing of damages in England and in Australia.

Now, we have tendered a judgment on the issues, the patent issues—

The Court: I know, I know.

Mr. McConnell: And I think that under the circum-[364] stances of this case, that we should be entitled to that at this time, with all due deference to your Honor.

The Court: I have indicated I would sign them, Mr. McConnell. If you want it done, and if you will submit an amended judgment and decree which embraces the figures from Canada, with the reservation in there in regard to the damages in regard to England and Australia, I will sign that.

Mr. McConnell: I would like to present that tomorrow morning.

Mr. Kayser: Your Honor, if it is to be in the form which he previously submitted, then we would like an opportunity to oppose it because there are aspects to it—

The Court: I mean, what can you say tomorrow that you didn't say the last two days?

Mr. Kayser: We were speaking about the contents and form of the judgment, your Honor. We are speaking about the matter of the injunctive provisions, and also, if the Hazeltine Corporation is to be named as a party to it we then wish to appear especially to oppose it on behalf of Hazeltine Corporation, the parent.

[365] The Court: Wasn't there a stipulation at the outset of this case that Hazeltine Research and Hazeltine Corporation were to be considered as one and the same?

Mr. Kayser: Your Honor, that stipulation does not have the effect which I gather your Honor is giving it here, and that's one of the subjects that—as appearing especially for Hazeltine Corporation, which we would wish to raise.

There are also provisions as concerns injunctive provisions themselves which would need some clarification.

The Court: Mr. McConnell, get this proposed new judgment and decree over to his office as early this afternoon as possible. I will hear you in regard to the entry of the decree at 11:00 o'clock tomorrow morning.

Mr. Kayser: And your Honor, how long may I have to file this affirmative defenses?

The Court: Five days nunc pro tunc as of today.

Mr. Kayser: Thank you.

The Court: All right.

Mr. McDougall: Your Honor, I have to be in Washington tomorrow morning to argue a case before the [366] District Court there.

The Court: Mr. McConnell may be able to get along without you.

Mr. McDougall: I am sure that he can. I didn't want by absence to be taken as a lack of interest in the proceedings, your Honor. Thank you very much.

The Court: All right.

(Whereupon, the hearing in the above-entitled matter was adjourned to 11:00 o'clock a.m. the following day, April 2, 1965.)

Supreme Court of the United States

No. 1117 ---- , *October Term, 19* 69

Zenith Radio Corporation,

Petitioner,

v.

Hazeltine Research, Inc.

ORDER ALLOWING CERTIORARI. Filed March 16 ---------- , 19 70.

The petition herein for a writ of certiorari to the United States Court of Appeals for the Seventh ---------- Circuit is granted, and the case is placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

FILE COPY

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JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969.

No. ~~1117~~ 80

ZENITH RADIO CORPORATION, A CORPORATION,
Petitioner,

vs.

HAZELTINE RESEARCH, INC., A CORPORATION,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969.

No. .....

ZENITH RADIO CORPORATION, A CORPORATION,
Petitioner,

vs.

HAZELTINE RESEARCH, INC., A CORPORATION,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Petitioner, Zenith Radio Corporation, a corporation, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit rendered October 27, 1969 in this cause.

OPINIONS BELOW.

The opinion of the Court of Appeals is as yet unpublished, but is printed in Appendix A, *infra*, pp. A1-A8. The Opinion of this Court is reported in 395 U. S. 100.

JURISDICTION.

The judgment of the Court of Appeals was entered on October 27, 1969 and its mandate stayed on November 6, 1969, Appendix A, *infra*, pp. A9-A10. The jurisdiction

of this Court is invoked pursuant to 62 Stat. 928, 28 U. S. C. 1254(1).

The relief here sought is a determination of whether or not the Court below has disregarded the mandate of this Court and in effect reversed the decision of this Court by vacating the judgment of the District Court awarding damages to Petitioner, Zenith Radio Corporation, for violation of the antitrust laws by Hazeltine Research, Inc. and the Canadian Patent Pool.

QUESTIONS PRESENTED FOR REVIEW.

1. Whether the Court below had jurisdiction under this Court's mandate which was limited to "further proceedings consistent with this opinion" to construe such mandate as remanding the issue of damages to the Court of Appeals "to consider the effect of HRI's affirmative release and statute of limitations defenses on the award."

2. Whether the Court below rendered a decision in conflict with the decision of this Court in holding that HRI's release and statute of limitations affirmative defenses justified vacating the damage award and judgment of the District Court in the amount of $6,297,391 before trebling entered on April 5, 1965.

3. Whether the Court below in determining that the affirmative defenses of release and statute of limitations had not been waived under Rule 12(h) of the Federal Rules of Civil Procedure and that the trial court had not held them waived pursuant to said Rule was in conflict with the decision of this Court in the instant case.

4. Whether the court below in determining that Petitioner was not entitled to argue that the statute of limitations had in all events been tolled under Section 5(b) of the Clayton Act during the pendency of *United States* v. *General Electric, et al.*, (Civil Action No. 140-157, S. D.

N. Y.) from November 28, 1958 to November 1, 1963 was in conflict with applicable decisions of this Court and in conflict with decisions of the Court of Appeals for the Eighth Circuit (*Hardy Salt Co.* v. *State of Illinois*, 377 F. 2d 768) and of the Court of Appeals for the Third Circuit (*State of New Jersey* v. *Morton Salt Company*, 387 F. 2d 94) in view of the fact that Hazeltine was named as a co-conspirator in the government action against General Electric Company.

5. Whether the court below had jurisdiction under this Court's mandate to vacate the District Court's award of $6,297,391 and grant a new trial of the damage award.

6. Whether the court below in attempting to limit petitioner's recovery on a new trial to the damage period starting June 5, 1959 and to limit petitioner's damages to those flowing from the June 5th, 1959 injury was in conflict with the decisions of this Court on treble damage recovery in this and other cases.

7. Whether the court below had jurisdiction, or was in conflict with the decision of this Court in the instant case, in determining what injury occasioned by acts prior to the damage period can be used in a new trial to offset petitioner's damage proofs, in the face of this Court's holding that "the record evidence is sufficient to support a finding of damage resulting from events occurring after the beginning of the damage period" and that "it is enough that the illegality is shown to be a material cause of the injury; a plaintiff need not exhaust all possible alternative sources of injury in fulfilling his burden of proof of compensable injury under § 4."

8. Whether the Court below was in conflict with the decisions of this Court in reserving for future determination the question of whether a treble damage award which

is based on proofs held legally sufficient by this Court is or is not excessive.

9. Whether the statute of limitations under Section 5(b) of the Clayton Act was tolled during the pendency of *United States* v. *General Electric, et al.,* (Civil Action No. 140-157, S. D. N. Y.) in which government proceeding Hazeltine was named as a co-conspirator in the same conspiracy asserted in the instant case.

STATUTES AND RULES INVOLVED.

The statutory provisions and Rules involved are 62 Stat. 928, 28 U. S. C. 1254(1); Sections 1 and 2 of the Sherman Act, 15 U. S. C. §§ 1 and 2; Sections 4, 5(b) and 16 of the Clayton Act and Rule 12(h) and Rule 52(a) of the Federal Rules of Civil Procedure. The foregoing statutes and rules are printed in Appendix B, *infra*, pp. A11-A14.

STATEMENT OF THE CASE.

In November, 1959 Hazeltine Research, Inc. (HRI), an Illinois corporation which owns and licenses domestic patents, principally in the radio and television field, brought suit in the Northern District of Illinois, claiming that Zenith television sets infringed HRI's patents. On May 22, 1963 Zenith filed a counterclaim against HRI for treble damages and injunctive relief, alleging violations of the Sherman Act resulting from misuse of HRI patents, including the one in suit, and a conspiracy among HRI, Hazeltine and patent pools in Canada, England and Australia. Zenith contended that these three patent pools had refused to license the patents placed within their exclusive licensing authority, including Hazeltine patents, to Zenith and others seeking to export American-made radios and television sets into these foreign markets.

The District Court, sitting without a jury, ruled for Zenith in the infringement action. On the counterclaim, HRI and Hazeltine—the parent company—were found to have conspired with the foreign patent pools to exclude Zenith from the Canadian, English and Australian markets. The District Court held Zenith was entitled to $35,000,000 in trebled damages. The court below reversed that judgment on the ground that no fact of damage had been proved (388 F. 2d 25 (7th Cir., 1968)).

This Court granted certiorari (391 U. S. 933) to consider, among other things, whether the Court of Appeals properly discharged its function under Rule 52(a) of the Federal Rules of Civil Procedure which specifies that the findings of fact made by a district court sitting without a jury are not to be set aside unless clearly erroneous.

This Court affirmed the lower court so far as the treble damage judgments involved the English and Australian pools. But, so far as the Canadian pool was concerned, it held the court below "was clearly in error." This Court said in *Zenith Radio Corp.* v. *Hazeltine Research*, 395 U. S. at pp. 118-9:

> "This evidence clearly warrants the inference that CRPL's past conduct interfered with and made more difficult the distribution of Zenith's products in 1959 and later years. The District Court could reasonably conclude that the cumulative effects of the pools' campaign against imported goods had consequences lasting well into the damage period. It could also rationally be found from the evidence that Zenith, beginning in 1958, could not have reached its maximum potential by May 22, 1959, that the pool had effectively prevented an earlier beginning, and that Zenith therefore suffered damage during the damage period from having a smaller share of the market than it would have had if the pool had never existed."

How much that share was lessened was demonstrated by proofs in the record described by this Court as follows (395 U. S. at p. 116):

> "Damages were awarded on the assumption that Zenith, absent the conspiracy, would have had 16% of the Canadian television market on May 22, 1959, and throughout the damage period rather than its actual 3% share."

This Court then said (395 U. S. at p. 119):

> "We also conclude that the record evidence is sufficient to support a finding of damage resulting from events occurring after the beginning of the damage period . . . HRI frankly conceded the continuation of the pool before the District Court, and it appears sufficiently clear that throughout this time, Zenith was deprived of what had always been refused it—a license on pool patents permitting it to sell American-made merchandise in Canada."

This Court then reversed the court below on the Canadian damage issue and remanded the case on the misuse injunction issue for further proceedings "consistent with this opinion" (395 U. S. at p. 141).

On remand to the Court of Appeals, Zenith filed a motion asking that Walter J. Cummings, Circuit Judge, recuse himself on the ground that said Judge had been the attorney for Western Electric Company, a subsidiary of American Telephone & Telegraph Company and a member of the Canadian patent pool. The motion recited that at the time said company executed the release in the RCA case, which HRI relies on to release it from acts of its co-conspirators, the said Walter J. Cummings was engaged as an attorney in defending Western Electric Company, which company HRI now claims to have been its co-conspirator in the Canadian patent pool. The record in *Zenith Radio Corp.* v. *Hazeltine Research* (Pl. Ex. 43, A. 2751), discloses Judge Cummings' signature on the stipula-

tion dismissing the case and shows that the said Judge was then attorney of record for the Western Electric Company, a defendant in the case. A copy of Zenith's motion is set forth as Appendix C, *infra,* pages A15-18.

Zenith's motion that Judge Cummings recuse himself was forthwith denied and in further proceedings on remand Zenith was forced to argue the issues presented before the Judge who had appeared as an antagonist to Zenith and had opposed each and every contention made by Zenith in the RCA case, which contentions involved the same illegal conspiracy and its effect on Zenith's Canadian business prior to October, 1957 at the time the RCA case was settled.

On remand, the Court below undertook to rehear issues disposed of by this court, express or implied, proceeded to order a hearing in the trial court of Canadian damage issues disposed of by that Court and affirmed by this Court, vacated the April 5, 1965 damage judgment and granted HRI the right to attempt to prove and to introduce evidence "to show that Zenith's damage flowing from 'damage causing' acts within the period did not amount to $6,297,391." No right was granted Zenith to show that the damages exceeded that amount and by footnote 3 of the opinion Zenith was denied the right to plead the tolling of the statute of limitations pursuant to Section 5(b) of the Clayton Act (A6).

This last holding is contrary to decisions in the Courts of Appeals in the Third and Eighth Circuits that the statute of limitations is tolled under Section 5(b) of the Clayton Act against a party named as a co-conspirator in a government suit involving the same conspiracy asserted in the instant case.

The Court below then proceeded to vacate the trial court's judgment of damages based on evidence which the court below itself admitted was legally sufficient to make out a *prima facie* case.

REASONS FOR GRANTING THE WRIT.

I.

THIS COURT HAS JURISDICTION BY A WRIT OF CERTIORARI TO REVIEW A DECISION OF THE COURT BELOW WHICH ATTEMPTS TO REVERSE THIS COURT'S DECISION BY GRANTING A NEW TRIAL, A REHEARING OR REVIEW OF THE CANADIAN DAMAGE FINDINGS AND PERMITTING A NEW DEFENSE ON THE MERITS TO BE INTRODUCED AT A NEW TRIAL.

This Court in *Zenith Radio Corporation* v. *Hazeltine Research, Inc.*, 395 U. S. 100, 141, ordered that the judgment of the Court of Appeals, "is affirmed in part and reversed in part, and the case is remanded to that Court for further proceedings consistent with this opinion."

In the case of *In Re Sanford Fork & Tool Co.*, 160 U. S. 247, 255 (1895) this Court said:

> "When a case has been once decided by this court on appeal and remanded to the circuit court, whatever was before this court and disposed of by its decree is considered as finally settled. The circuit court is bound by the decree as the law of the case; and must carry it into execution, according to the mandate. That court cannot vary it, or examine it for any other purpose than execution; or give any other or further relief; or review it, even for apparent error, upon any matter decided on appeal; or intermeddle with it further than to settle so much as has been remanded."
>
> "*If the circuit court mistakes or misconstrues the decree of this court, and does not give full effect to the mandate, its action may be controlled, either upon a new appeal . . . or by a writ of mandamus to execute the mandate of this court* . . . the opinion delivered by this court at the time of rendering its decree may be

> consulted to ascertain what was intended by its mandate; and either upon the application for a writ of mandamus, or upon a new appeal, it is for this court to construe its own mandate, and to act accordingly." (Italics ours.)

Nowhere in this Court's opinion is there any direction, express or implied, directing the court below to grant a new trial on the Canadian damage issue or authorizing the court below to grant HRI a new opportunity to introduce testimony in support of its defense of the statute of limitations, aimed at excluding from recovery, damages flowing from pre-damage period acts "as well as an opportunity to introduce evidence to show that Zenith's damage flowing from 'damage causing' acts within the period did not amount to $6,297,391."

To reach the extraordinary conclusion that this Court expressly authorized it to take the above action, the court below had to reverse this Court on three important and controlling decisions in this case. First, the holding of this Court that the defenses of limitations and release were "belatedly raised" and therefore waived. Second, that acts showing the fact of damage outside the damage period were not barred by release or limitations; and third, that acts subsequent to May 22, 1959 were sufficient to support the damage findings.

In order to reverse this Court's statements concerning the waiver of affirmative defenses, the court below stated, without support from the record, that:

> "It is our view that the [trial] Court's ruling was not on the basis of waiver, but because the defenses on their merits did not bar Zenith's recovery."

The Court of Appeals reaches this conclusion notwithstanding the comment of the trial judge to HRI counsel that, "You do agree that the statute of limitations can be

waived" (Court of Appeals Appendix, 2026). However, it is well settled that the trial court's decision can be supported by any ground sustained by the record, whether assigned by the trial court or not. See *Helvering* v. *Gowran*, 302 U. S. 238, 245 (1938) where this Court said:

> "[I]f the decision below is correct, it must be affirmed, although the lower court relied upon a wrong ground or gave a wrong reason."

More pertinent is this Court's holding in Footnote 13 of its opinion, as follows (395 U. S. at p. 117):

> "HRI's answer to Zenith's counterclaim did not plead a statute of limitations defense. However, in the course of proceedings after entry of the District Court's initial findings of fact and conclusions of law, but before judgment, the trial court granted the oral motion of HRI's new counsel for 'leave to file' defenses based on the statute of limitations and on the release given by Zenith pursuant to the 1957 settlement agreement . . . The trial court, without further mention of these defenses, forthwith refused to set aside or amend the damage award as to Canada, thus either rejecting the statute of limitations defense or considering it to have been waived under Fed. Rule Civ. Proc. 12(h) as urged by Zenith in both the District Court and the Court of Appeals."

The court below rids itself of the waiver issue by, in effect, reversing this Court's ruling and construing the trial court's mental processes as precluding a ruling of waiver. That the waiver was final and conclusive and could not be remedied by filing the affirmative defenses a year after trial and after findings had been made is shown by the decisions of the court below. See *Roe* v. *Sears, Roebuck & Co.*, 132 F. 2d 829 (7th Cir. 1943); *Charm Tred Mills* v. *Erle P. Halliburton, Inc.*, 202 F. 2d 294 (7th Cir., 1953); *Wagner* v. *Fawcett Publications*, 307 F. 2d 409 (7th Cir., 1962).

This court described the so-called affirmative defenses as "belatedly raised" and used the words "unwaived" and "properly asserted" in the Footnote 13 of its opinion, which was a clear holding that the trial court had properly ruled that those affirmative defenses were not in the case. This Court then said in the same footnote that it need not "deal with the question of whether damage period injury from pre-damage period conduct is recoverable where an *unwaived* statute of limitations defense is *properly asserted.*" Obviously, this Court agreed with the trial court that these defenses had been waived and not properly asserted and that therefore they were not in the case.

The court below refers to this Court's statements in its opinion that since the District Court "attributed the deficient share on May 22, 1959 to the conduct of the pool, that conduct necessarily preceded the deficiency, and therefore pre-damage period conduct necessarily resulted in some part of the damages awarded." What the court below ignores is this Court's decision that such finding, even if true, was irrelevant in the disposition of this case.

Thus, this Court says (395 U. S. at pp. 118-9):

> "This evidence clearly warrants the inference that CRPL's past conduct interfered with and made more difficult the distribution of Zenith's products in 1959 and later years. The District Court could reasonably conclude that the cumulative effects of the Pools' campaign against imported goods had consequences lasting well into the damage period. It could also rationally be found from the evidence that Zenith, beginning in 1958, could not have reached its maximum potential by May 22, 1959, that the pool had effectively prevented an earlier beginning, and that Zenith therefore suffered damage during the damage period from having a smaller share of the market than it would have had if the pool had never existed."

Certainly, this Court thereby expressly ruled that such pre-damage period conduct was not barred by limitations or release as the court below, in an attempt to reverse this Court, now holds.

Further, this Court in effect has ruled that the statute of limitations even if applicable would not run during the pendency of the instant suit and that the counterclaim would relate back to the filing of the instant suit thus making the entire limitations issue irrelevant and moot. See this Court's opinion, 395 U. S. at p. 102, footnote 2.

Finally, if pre-damage period conduct is barred from consideration with respect to the amount of damage by limitations or release, as the court below now holds, how could this Court reach the conclusion that pre-damage period conduct was competent evidence on the fact of damage issue? Obviously, if pre-damage period conduct can be considered on the fact of damage issue, it must be relevant and competent evidence as to the amount of damage. In this connection, it should be remembered that HRI argued in this Court that the evidence of damage-causing conduct occurring outside the four year damage period was barred by release and limitations and could not be considered on the fact of damage issue. (pp. 50-55 HRI main brief in this Court.) Specifically, HRI urged that this Court could not consider the evidence of (1) the July, 1958 McConnell-Kiley meeting in which Brian McConnell, the pool manager informed Zenith "that to continue business in Canada, Zenith would be required to sign CRPL's standard license which did not permit importation, and that to sell in Canada it must manufacture there."; (2) the September 1958 *Trade Builder* notice in which the pool again threatened distributors, dealers and users of unlicensed sets with infringement litigation, and (3) the May 12, 1959 McConnell-Crotty

conversation in which "the pool manager conferred with Zenith's Vice-President, informing him that Zenith was infringing pool patents and would require a license, but that licenses were granted only for local manufacture."

Similarly, HRI contended that this Court could not consider earlier pool conduct, namely, explicit refusals to grant a license for importation in 1953 and the threats of suits against Zenith's Canadian distributors and dealers in 1951 and 1954, because such acts occurred prior to the 1957 release date. (HRI main brief in this Court pp. 48-50.) This Court, however, reviewed and ruled upon this evidence and specifically referred to it and said "For many years Zenith attempted to establish distribution in Canada, but distributors were warned off by the pool, and Zenith's efforts to secure a license for American-made goods were unsuccessful." This Court concluded that this evidence, as well as the evidence after the release date but before the start of the statutory damage period "clearly warrants the inference that CRPL's past conduct interfered with and made more difficult the distribution of Zenith products in 1959 and later years. The District Court could reasonably conclude that the cumulative effects of the pools' campaign against imported goods had consequences lasting well into the damage period" (395 U. S. p. 118).

Obviously, if this Court believed that the defenses of release and limitations were bars to the consideration of the pre-damage period evidence, it would not have used this evidence to sustain its finding that the fact of damage had been proved. These claimed defenses either are a bar or not a bar, and if they do not bar consideration of pre-damage period conduct on the fact of damage issue, *a fortiori*, they could not bar consideration of this same evidence on the issue of damage amount. Further, the court below ignored this Court's holding which expressly ap-

proves the damage theory and measure of damages employed by the District Court in fixing petitioner's damages. This Court states at 395 U. S. pp. 124-5:

> "Here, Zenith was denied a valuable license and submitted testimony that without the license it had encountered distribution difficulties which prevented its securing a share of the market comparable to that which it enjoyed in the United States, and which its business proficiency, demonstrated in the United States, dictated it should have obtained in Canada. CRPL was an established organization with a long history of successfully excluding imported merchandise; and in view of its continued existence during the damage period, the injury alleged by Zenith was precisely the type of loss that the claimed violations of the antitrust laws would be likely to cause. *The trial court was entitled to infer from this circumstantial evidence that the necessary causal relation between the pool's conduct and the claimed damage existed.*" (Italics ours.)

This Court's opinion will be searched in vain for any intimation that the Zenith damage computation in Canada was not legally or factually sufficient.

This Court in its opinion admonished the court below not to attempt to deal with questions of fact "*de novo*" and to follow the teaching and rationale of the *Bigelow* case. The Court below understands this rationale as appears conclusively from its opinion in *Milwaukee Towne Corp.* v. *Loew's, Inc.*, 190 F. 2d 561, 566 (7th Cir., 1951), where it said:

> "Neither do we need to follow defendants in their detailed argument designed to show numerous fallacies and inaccuracies in the exhibit prepared and submitted by plaintiff's accountant, for the reason that under the rationale of the *Bigelow* case we are satisfied that it was within the province of the trier of the facts to rely upon the computation there disclosed, providing, of course, there was proof of the fact of damage."

Obviously, in the face of a direct finding by this Court that the evidence shown in this record is sufficient to support the trial court's damage findings in Canada, no grant of authority by this Court to order a new trial on the issue of damages can be implied. The court below assumes that authority by its own statement that this Court remanded the Canadian damage issue "to us to consider the effect of HRI's affirmative release and statute of limitations defenses on the award." Nowhere in this Court's opinion is there any such direction.

II.

THIS COURT GRANTED NO AUTHORITY TO THE COURT BELOW TO VACATE THE APRIL 5, 1965 JUDGMENT BY GRANTING A NEW TRIAL OR TO LIMIT PETITIONER'S DAMAGE PROOFS TO DAMAGES FLOWING FROM THE JUNE 5, 1959 LETTER.

The court below without any showing that the trial court abused its discretion in denying a new trial on the Canadian damage issue, has granted a new trial, limiting the issues to be tried in such a way as to in effect destroy the petitioner's right to recover treble damages in this case.

The court below has repeatedly held that the refusal to grant a new trial is not subject to review "except under exceptional circumstances showing a clear abuse of discretion." *Stinebower* v. *Scala*, 331 F. 2d 366, 367 (7th Cir., 1954).

Recognizing that the record shows no abuse of discretion on the part of the trial court, HRI counsel now say in their brief in opposition to Zenith's petition for a writ of mandamus, p. 31:

> "Thus, this case does not involve questions concerning abuse of discretion or of 'newly discovered evidence' but rather an erroneous ruling of law by the

> trial court, which, when corrected by the Court of Appeals required further hearings on the amount of damages."

However, the opinion of the court below was not limited to statute of limitations or release or any other question of law but was an unlimited new trial as shown by the following statement of the court below that HRI was to be given "an opportunity to introduce evidence to show that Zenith's damage flowing from 'damage causing' acts within the period did not amount to $6,297,391."

This obviously was a new trial on the damage issue granted HRI alone without justification from this Court's mandate and with no showing of any abuse of discretion by the trial court. The new trial ordered by the court below raises the question of law whether petitioner's damages can be limited to those shown to be the result of each particular overt act during the damage period. This was an obvious attempt to reverse the decision of this Court in *Bigelow* which permitted proof of damages by comparing earnings in defendants' theatres with those of petitioners. The rule applied by the court below would have completely precluded petitioner's damage proofs in *Bigelow*. If allowed to stand, every decision on treble damage rendered by this Court is no longer the law in the Seventh Circuit.

This Court, in the hearing on certiorari, had the entire case before it and the issue of whether or not the trial court properly denied the HRI motion to re-open the Canadian damage issue was before this Court. Counsel for HRI now concede that only a question of law was involved and this Court did not in any way disturb the trial court's decision.

In the case of *In Re Potts*, 166 U. S. 263, 267 (1897), this Court said:

> "When the merits of a case have been once decided by this court on appeal, the circuit court has no au-

thority, without express leave of this court, to grant a new trial, a rehearing, or a review, or to permit new defenses on the merits to be introduced by amendment of the answer."

The court below has done all of these things with no leave from this Court, either express or implied.

Further, the court below has imposed conditions on a new trial which would completely reverse this Court's decision with respect to the damage issues. Thus the Court holds that petitioner cannot rely on damage causing acts prior to the damage period the cumulative effects of which this Court held "interfered with and made more difficult the distribution of Zenith's products in 1959 and later years". The opinion of the Court of Appeals apparently also would limit recovery of damages during the damage period to those flowing from the June 5, 1959 letter, or to dollar amounts ascribable to individual "overt" acts. These conditions if permitted to stand would destroy not only petitioner's damage claim but if such conditions can be interpolated into the Act the trial of a treble damage claim under the antitrust laws is impossible in the Seventh Circuit.

In its opinion in the instant case, this Court said, "The purpose of giving private parties treble damages and injunctive remedies was not merely to provide private relief, but was to serve as well the high purpose of enforcing the antitrust laws" (395 U. S. at pp. 130-1). We submit that the rulings of the court below reversing this Court's decisions and imposing conditions upon a treble damage suit not permitted by the Act is a matter of grave public concern which must be remedied by this Court if the purposes of that Act are to be preserved in the Seventh Circuit.

III.

SINCE THE GOVERNMENT SUIT AGAINST GENERAL ELECTRIC NAMED HAZELTINE AS A CO-CONSPIRATOR THE HOLDING OF THE COURT BELOW THAT THE STATUTE OF LIMITATIONS COULD NOT BE TOLLED PRESENTS NOT ONLY A QUESTION OF GREAT PUBLIC IMPORTANCE IN THE ENFORCEMENT OF THE ANTITRUST LAWS BUT A CONFLICT WITH THE DECISIONS OF OTHER COURTS OF APPEALS AS WELL.

This Court in its opinion in the instant case said:

> "The purpose of giving private parties treble damages and injunctive remedies was not merely to provide private relief but was to serve as well the high purpose of enforcing the antitrust laws." (395 U. S. at pp. 130-1.)

Obviously, a decision circumscribing a treble damage recovery by an erroneous interpretation of the provisions of Section 5(b) of the antitrust laws is a matter of public concern deserving of remedy by this Court.

For example, the defenses of limitations and release were raised for the first time one year after trial, and after the trial court had entered findings of fact and conclusions of law. The only claimed justification for the delay was a fabricated claim that Zenith had changed its legal theory to the surprise and prejudice of the HRI counsel (A. 2943). The trial court recognized the entire contention as a fraud (A. 3033, 3036-8, 3040; Court of Appeals Appendix, A. 1865, 1870, 1934, 1950, 1953). While the trial court permitted these defenses to be filed "for the sake of the record" in support of HRI's post trial motion to dismiss the counterclaim (A. 3036), this did not amount to an amendment of the answer to the counterclaim under Fed. Rule Civ. Proc. 15(b) and (c), and as we have shown before, did not remedy the waiver of those defenses. If the disposition of the case by the court below is allowed to

stand Zenith must start all over again on an irrelevant and discredited legal issue ten years after the case was started just as if this case had never been before this Court at all.

Further, the ruling of the court below would not only permit HRI to litigate waived and meritless defenses, but at the same time would deny Zenith the benefit of tolling of the statute of limitations, thus destroying petitioner's rights as a litigant. Zenith certainly was entitled to contend that under § 5(b) of the Clayton Act, the suit was tolled during the pendency of *United States* v. *General Electric, et al.*, from November 24, 1958 to November 1, 1963, thereby extending the permissible recovery period back to 1954 and making all of the contentions about acts being barred by the statute of limitations academic and irrelevant.

However, the court below says the point is not before it because Zenith "did not raise this point in a reply to HRI's affirmative defense." Obviously, Zenith was not required to "plead" the effect of tolling as a reply to HRI's "belatedly raised" limitations defense. Fed. Rule Civ. Proc. Rule 7 expressly provides that such a pleading is unnecessary and shall not be allowed except where ordered by the Court.

Moreover, the further statement of the court below that "in any event the law of this circuit is that the tolling of the limitations protects the plaintiff in a private antitrust suit only with respect to a party defendant in a government suit. *Sun Theatre Corp.* v. *RKO Radio Pictures*, 213 F. 2d 284, 292 (7th Cir., 1954)," results in a direct conflict with the decisions of this Court and with Courts of Appeals in other Circuits.

The *Sun Theatre* case was decided before § 5 of the Clayton Act was amended by the Congress in 1955. After the amendment of the statute, two cases in other Circuits

squarely held that the statute of limitations as to named co-conspirators in the government action is tolled, *Hardy Salt Co.* v. *State of Illinois,* 377 F. 2d 768 (8th Cir., 1967) and *State of New Jersey* v. *Morton Salt Company,* 387 F. 2d 94 (3rd Cir., 1967). Hazeltine was a named co-conspirator in the government action against General Electric *et al.*

The construction adopted in the 1954 *Sun Theatre* case that tolling only occurred when a judgment or decree in a government action would have estoppel effect was expressly rejected by this Court in *Minnesota Mining* v. *New Jersey Wood F. Co.,* 381 U. S. 311 (1965) and *Leh* v. *General Petroleum Corp.,* 382 U. S. 54 (1965).

IV.

THERE IS NO PROVISION IN THE FEDERAL ANTITRUST LAWS LIMITING PETITIONER'S RECOVERY TO INDIVIDUAL ACTS THUS EXCLUDING DAMAGE PROOFS COMPARING A BUSINESS RESULT IN AN OPEN MARKET WITH AN ILLEGALLY RESTRICTED MARKET.

The court below next proceeds to reverse this Court by stating "The record establishes that on June 5, 1959 the Canadian pool wrote Zenith claiming that it was infringing pool patents by its distribution of American-made televisions and radios in Canada. This act was substantially similar to overt acts occurring in the predamage period. Accordingly, Zenith claiming the right to recover for damages suffered only in the statutory period, is entitled to recover for the damages it suffered as a result of the June 5th injury." This holding apparently attempts to limit Zenith's damages to the damages it suffered as a result of the June 5 injury. If this is so, it is an attempt to reverse the decision of this Court set forth in its opinion as follows (395 U. S. at pp. 124-5):

> "Here, Zenith was denied a valuable license and submitted testimony that without the license it had encountered distribution difficulties which prevented its securing a share of the market comparable to that which it enjoyed in the United States, and which its business proficiency, demonstrated in the United States dictated it should have obtained in Canada."

Obviously, this damage found by this Court is not limited to one item of damage flowing solely from the letter of June 5, 1959.

The court below next states that the damage proofs upon which the amount of damages could be computed, while competent evidence, were only "prima facie" and that therefore it still had before it an issue as to "excessiveness of the award." This, of course, is an interpolation into the Act and is not permitted under any of the decisions of this Court on the subject of damages in any antitrust case.

This Court in *Story Parchment Co.* v. *Paterson P. Paper Co.*, 282 U. S. 555 (1931) disposed of any contention such as made by the court below that it is still free to set aside a judgment supported by competent evidence on the ground that the court below may think it was excessive. There the Court said at p. 562:

> "It is true that there was uncertainty as to extent of the damage, but there was none as to the fact of damage . . .The rule which precludes the recovery of uncertain damage applies to such as are not the certain result of the wrong, not to those damages which are definitely attributable to the wrong and only uncertain in respect to their amount."

See also *Eastman Kodak Co.* v. *Southern Photo Materials Co.*, 273 U. S. 359, 379 (1927).

Further such a reservation by the Court below is utterly inconsistent with this Court's statement in its opinion that: "The authority of an appellate court, when reviewing the

findings of a judge as well as those of a jury, is circumscribed by the deference it must give to decisions of the trier of the fact, who is usually in a superior position to appraise and weigh the evidence" (395 U. S. at p. 123).

In the instant case the court below has vacated the judgment which it conceded was based on evidence upon which the amount of damage could be reasonably computed by virtue of this Court's decision in *Bigelow* v. *RKO Radio Pictures*, 327 U. S. 251 (1946).

In the trial court, HRI was free to offer proof rebutting petitioner's competent evidence of damage. It took no exception to Zenith's proofs and filed no countervailing evidence or proofs at the trial *and made no showing of any newly discovered evidence* in the post-trial proceedings. After the case had been before this Court and the findings of damage had been approved here, the court below now considers it has authority to grant a new trial on an irrelevant issue, namely, whether or not evidence of damage flowing from pre-damage period acts was mixed into the damage award, notwithstanding this Court's express finding that "the record evidence is sufficient to support a finding of damage resulting from events occurring after the beginning of the damage period" (395 U. S. at p. 119) and this Court's holding that "It is enough that the illegality is shown to be a material cause of the injury; a plaintiff need not exhaust all possible alternative sources of injury in fulfilling his burden of proving compensable injury under § 4" (395 U. S. at p. 114, footnote 9).

Further, the issue is irrelevant and expressly so held in this Court's present opinion wherein it says that the thrust of this defense was primarily that "the findings as to Canada had erroneously included damages resulting from the conduct occurring prior to May 22, 1959" (395 U. S. at p. 117, footnote 13). Obviously if such a thrust had merit it was as much a defense to the fact of damage as to the

amount. This Court, however, sustained the trial court's findings whether based on pre-damage period conduct or damage period conduct irrespective of any statute of limitations or release defense. Surely the court below had no authority to reverse this Court by vacating the treble damage award and granting a new trial limited to damage period evidence, and thus, in effect destroying this Court's opinion on the damage issues in this case.

It also appears from this Court's opinion in *Bigelow* v. *RKO Radio Pictures*, 327 U. S. 263, 265 that whether or not damages flowing from pre-damage period acts are mixed in with damage period acts is irrelevant. Thus, this Court says:

> "And in cases where a wrongdoer has incorporated the subject of a plaintiff's patent or trademark in a single product to which the defendant has contributed other elements of value or utility and has derived profits from the sale of the product, this Court has sustained recovery of the full amount of defendants' profits where his own wrongful action has made it impossible for the plaintiff to show in what proportion defendant had contributed to the profits."

This Court also said in the same case (327 U. S. at 265):

> "The constant tendency of the courts is to find some way in which damages can be awarded where a wrong has been done. Difficulty of ascertainment is no longer confused with right of recovery for a proven invasion of the plaintiff's rights."

V.

SINCE THIS COURT REFUSED TO REMAND THE ISSUE OF A NEW TRIAL THE COURT BELOW HAD NO JURISDICTION TO GRANT A NEW TRIAL ON THE CANADIAN DAMAGE ISSUE.

At p. 145 of the HRI brief in this Court, it was contended that this Court should remand the case to the court below for a determination of other issues which included the issue of whether the trial court erred in refusing to grant a new trial. In answer, Zenith argued before this Court at pp. 50-53 of its reply brief that there was no abuse of discretion by the trial court and therefore under applicable law there was no jurisdiction in the court below to review such denial or to grant a new trial.

We pointed out that under the decision of this Court in *Delk* v. *St. Louis & S. F. R. Co.*, 220 U. S. 580 (1911) that "as the case is here upon certiorari to review the judgment of the circuit court of appeals, this court has the entire record before it with the power to review the action of that court as well as direct such disposition of the case as that court might have done." Since this Court did not disturb the trial court's denial of a new trial and did not remand the issue, and certainly did not direct a new trial, the court below had no jurisdiction to do so.

Finally, without exception this Court has held the lower courts bound to accept the decision of this Court on the matters which have been before it. At pp. 147-149 of the HRI main brief in this court the amount of petitioner's damages was argued at length. That argument was answered at pp. 50-55 of petitioner's reply brief under the heading "There was no merit in Hazeltine's post trial motions and they were properly denied by the trial court." Here, the opinion of this Court has found the trial court's

damage findings supported by the record evidence and has refused to disturb them on any ground urged. That disposition is binding on the court below. See *United States* v. *Haley*, 371 U. S. 18 (1962); *United States* v. *Parke, Davis & Co.*, 365 U. S. 125 (1961); *Briggs* v. *Pennsylvania R. Co.*, 334 U. S. 304 (1948).

In *Perkins* v. *Standard Oil Co.*, 23 L. Ed. 2d 599, 608 (1969), the Court of Appeals vacated a judgment for a treble damage plaintiff. This Court reversed that decision, stating:

> "We therefore see no need to prolong this litigation which began nearly ten years ago. The jury's verdict and judgment should be reinstated."

CONCLUSION.

WHEREFORE, Zenith asks that a writ of certiorari issue to review the judgment of the Court below and that on such review the Judgment entered by the District Court on April 5, 1965 be reinstated.

Respectfully submitted,

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APPENDIX A.

IN THE UNITED STATES COURT OF APPEALS,

For the Seventh Circuit.

September Term, 1969 — September Session, 1969

Nos. 15246, 15563

HAZELTINE RESEARCH, INC., *Plaintiff and Counter-Defendant, Appellant,*

vs.

ZENITH RADIO CORPORATION, *Defendant and Counter-Claimant, Appellee.*

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.

October 27, 1969

Before CASTLE, *Chief Judge*, KILEY and CUMMINGS, *Circuit Judges.*

KILEY, *Circuit Judge.* This court, on December 19, 1967, filed its decision, 388 F. 2d 25 (7th Cir. 1967), in the above causes and, so far as pertinent now, affirmed the judgment awarding $150,000, treble damages, to Zenith Radio Corporation for misuse by Hazeltine Research, Inc. (HRI) of its domestic patents, but struck paragraph A of the related injunction, issued to restrain HRI from imposing unlawful conditions on those patents. We reversed the judgment in Zenith's favor for $38,000,000, treble dam-

ages, based on HRI's unlawful participation in the Canadian, English and Australian patents pools, and *ipso facto* set aside an injunction restraining HRI's further unlawful antitrust activity in these foreign patent pools.

On appeal to the Supreme Court, the treble damage award with respect to the domestic patents was not challenged. The Court, 395 U. S. 100 (1968), reversed our decision striking paragraph A of the injunction and remanded that part to this court for further consideration. *The Court also reversed our decision setting aside the award of damages flowing from the unlawful activity of the Canadian pool and remanded that issue to us to consider the effect of HRI's affirmative release and statute of limitations defenses on the award.* In addition, the Court reinstated the related injunction which this court had set aside with that treble damage judgment for Zenith.[1] The Supreme Court reversed our decision with respect *to the Canadian patent pool because it concluded we erred in our determination that Zenith had failed to prove the "fact" of damage in Canada.*

After the Supreme Court mandate was filed in this court, we gave leave to HRI and Zenith to file supplemental authorities. Zenith thereupon "abandon[ed] its request" originally made in this court to reinstate paragraph A which this court had struck. The following questions are before us: (1) whether Zenith's injury during the statutory damage period resulted to any extent from HRI's conduct preceding that period and, if so, what effect releases given by Zenith in 1957 had on Zenith's recovery; (2) what effect the statute of limitations had

1. The Supreme Court affirmed this court's decision vacating judgments in Zenith's favor against Hazeltine Corporation. It affirmed our decision with respect to setting aside the treble damage judgment so far as it was based on the patent pool activities in England and Australia.

on HRI's liability; and (3) whether the award of damages was excessive. *These points had been raised before us by HRI in the first appeal, but we saw no need of passing on them in view of our reversal of the judgment for Zenith.*

We have examined the issues now before us in the light of the Supreme Court opinion and the supplemental authorities cited to us. We vacate the judgment for Zenith with respect to the Canadian pool in the amount of $6,297,391, trebled, and remand for further proceedings with respect to the award of damages.

THE AFFIRMATIVE DEFENSES.

After the evidence at the trial was closed HRI moved for leave to file the affirmative defenses in bar of Zenith's recovery. *Zenith's counsel objected to the filing of the defenses on the ground that they came too late and were waived.* The district court, however, permitted the defenses to be filed and thereafter denied HRI's motion for judgment based on the defenses. The Supreme Court noted that the district court's refusal to disturb the findings it had already made with respect to the Canadian pool *was a rejection of the defenses either on the merits or on the ground that the defenses had been waived under Fed. R. Civ. P. 12(h). 395 U. S. 100, 117, n. 13. It is our view that the court's ruling was not on the basis of waiver, but because the defenses on their merits did not bar Zenith's recovery.* We turn therefore to consideration of the correctness of the district court's ruling.

The relevant four year damage period was measured from May 22, 1963, when Zenith filed its counterclaim.[2] The cutoff date therefore was May 22, 1959. HRI relies

2. See 395 U. S. 100, 108 (1968). 15 U. S. C. § 15b reads:

> Any action to enforce any cause of action under sections 15 or 15a of this title shall be forever barred unless commenced within four years after the cause of action accrued.

upon releases given September 27, 1957, by Zenith to RCA, General Electric, and Western Electric in settlement of Zenith's counterclaim in the case of *RCA* v. *The Rauland Corp. and Zenith Radio Corp.*, No. 48 C 1818 (N. D. Ill. 1957), in contending that Zenith's claim is now barred.

The Supreme Court in noting that the district court did not date the events as occurring before or after the May 22, 1959 start of the damage period, said "[t]he damage award was confined to *injuries* sustained during the damage period, but the trial court apparently deemed it immaterial whether the damage-causing acts occurred before or after the start of the damage period." 395 U. S. 100, 116 (1968). Damages were awarded, the Court said, on the assumption that were it not for the conspiracy, Zenith would have had sixteen per cent of the Canadian market instead of its actual three per cent on May 22, 1959 and throughout the damage period. The Court then stated that since the district court attributed the deficient share on May 22, 1959 to the conduct of the pool, that conduct necessarily preceded the deficiency, and therefore pre-damage period conduct necessarily resulted in some part of the damages awarded.

Since HRI was an unnamed joint tortfeasor, as admitted by Zenith at trial, with its co-conspirators in the Canadian pool who were named in the *Rauland* case, and Zenith did not reserve its right against HRI, the releases given by Zenith clearly barred recovery from HRI of past, present and *future damages* flowing from any misconduct of HRI prior to the dates of the releases. *Twentieth Century-Fox Film Corp.* v. *Winchester Drive-In Theatre*, 351 F. 2d 925, 931 (9th Cir. 1965), *cert. denied*, 382 U. S. 1011 (1966); *Dura Electric Lamp Co.* v. *Westinghouse Electric Corp.*, 249 F. 2d 5 (3r Cir. 1957). Our inquiry therefore is narrowed to the question of the effect of the statute of limitations on Zenith's right of recovery for post-release misconduct.

It is "well settled . . . that no civil action lies for a conspiracy unless there be an overt act that results in damage to the plaintiff." *Nalle* v. *Oyster*, 230 U. S. 165, 182 (1913). Consequently, in the case before us the mere existence of the conspiracy following the 1957 releases does not itself give rise to Zenith's cause of action. The law with respect to the statute of limitations in Sec. 15b of the Clayton Act is that the period commences to run from the last overt act of the conspiracy. *Crummer Co.* v. *DuPont*, 223 F. 2d 238, 247-48 (5th Cir.), *cert. denied*, 350 U. S. 848 (1955); *Momand* v. *Universal Film Exchange*, 43 F. Supp. 996, 1007 (D. Mass. 1942), *aff'd* 172 F. 2d 37, 47 (1948); *Steiner* v. *Twentieth Century-Fox Film Corp.*, 232 F. 2d 190, 194 (9th Cir. 1956); *Century Hardware Corp.* v. *Powernail Co.*, 282 F. Supp. 223, 227 (E. D. Wis. 1968). In *Century Hardware*, the district court construed this court's decisions in *Emich Motor Co.* v. *General Motors Corp.*, 229 F. 2d 714 (7th Cir. 1956), and *Baldwin* v. *Loew's, Inc.*, 312 F. 2d 387 (7th Cir. 1963), as stating the law of this Circuit to be in accordance with the foregoing decisions.

In *Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.*, 377 F. 2d 776 (3rd Cir. 1967) (supplemental opinion at 793-95), the following rule was applied:

> [W]here the repeated and measurable invasion of a plaintiff's rights occurs both outside the statutory period and also within it, the fact that some of the injury and change occurred outside the statutory period does not affect the plaintiff's right to recover for the separative invasion of its rights which occurred within the period.

The rule as applied in that case was approved by the Supreme Court on appeal of the *Hanover* case. See 392 U. S. 481, 502 n. 15 (1968). Thus, even though Zenith may have had a cause of action for overt acts of the conspiracy prior to May 22, 1959—the beginning of the damage period—

the fact that it did not then file suit does not preclude its present suit for damages suffered within the damage period as a result of an overt act repetitious of the unlawful pre-period acts occurring in the damage period.

HRI conceded at trial that the Canadian pools existed into the damage period. The record establishes that on June 5, 1959, the Canadian pool wrote Zenith claiming that it was infringing pool patents by its distribution of American-made televisions and radios in Canada. This act was substantially similar to overt acts occurring in the pre-damage period. Accordingly, Zenith, claiming the right to recover for damages suffered only in the statutory period, is entitled to recover for the damages it suffered as a result of the June 5 injury.[3]

We conclude therefore that the district court's denial of *the motion to bar Zenith's recovery completely on the ground of the releases and the running of the statute of limitations was not erroneous.*

Excessiveness of the Award.

We think this issue is not now ripe for decision because HRI had no opportunity, after the district court permitted filing of HRI's affirmative defenses, to introduce evidence relevant to the affirmative defenses. We vacate the district court's award of $6,297,371—trebled to $18,892,173—and remand for further proceedings.

---

3. Zenith argued in its original brief that the statute of limitations was tolled by reason of Sec. 5(b) of the Clayton Act during the pendency of *United States* v. *General Electric, et al.* in the Southern District of New York from November 28, 1958 to November 1, 1963. At the trial Zenith did not raise this point in a reply to HRI's affirmative defense, so that, strictly speaking, the point is not properly before us. However, in any event, the law of this circuit is that the tolling of the limitation protects a plaintiff in a private antitrust suit only with respect to a party defendant in the government suit. *Sun Theatre Corp.* v. *RKO Radio Pictures*, 213 F. 2d 284, 292 (7th Cir. 1954). HRI was not a party defendant in that suit, although named as co-conspirator.

The measure of proof is the difference between the percentage share that Zenith actually enjoyed during the damage period and the percentage it would have had as a free competitor. There was testimony for Zenith, relied on by the district court, that in the four year damage period, had Zenith been free from the unlawful activity of the Canadian pool which virtually excluded it from the Canadian market, *it would have enjoyed the same proportion of that market as it did in the United States market.* In Canada its principal competitors were counterparts of its principal competitors in the United States. Its promotion and advertising flowed back and forth between the two countries. Distributors in Canada were available, but were frightened off by the pool's activities and threats. *It is our view that this was competent evidence, prima facie, upon which the amount of damage could be reasonably approximated by virtue of the Supreme Court's decision in Bigelow* v. *RKO Radio Pictures,* 327 U. S. 251, 264-65 (1946).

The district court in permitting the filing of HRI's affirmative defenses of release and statute of limitations—as an amendment to HRI's defense to Zenith's counterclaim —*made it plain in doing so that the court would make no change in its findings and* conclusions with respect to *damage in the Canadian market.* However, we refer again to the statement of the Supreme Court that "[s]ome part of the damages awarded . . . *necessarily resulted from pre-damage period conduct.*" 395 U. S. 100, 116-17. The Court noted that although the damage award was confined to the damage period, the trial court apparently deemed it immaterial whether the "damage-causing" acts occurred before or after the start of the damage period.

Earlier in this opinion we held that the releases only barred Zenith's recovery of damages caused by injuries

inflicted prior to the date of the releases; that the damage period commenced to run from the last overt act of the conspiracy; and that the statute of limitations did not bar recovery of damages *caused by "damage-causing" acts within the period.* Accordingly, we think that HRI should have—what it was not given at the trial—an opportunity to introduce testimony, in support of its defense of statute of limitations, aimed at excluding from recovery damages flowing from pre-period "damage-causing" acts, as well as *an opportunity to introduce evidence to show that Zenith's damage flowing from "damage-causing" acts within the period did not amount to $6,297,391.*

The judgment for $6,297,391 — before trebling — is vacated and the cause is remanded for further proceedings consistent with the views expressed in this opinion. (Italics ours.)

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois 60604

Monday, October 27, 1969.

Before

Hon. Latham Castle, Chief Judge.

Hon. Roger J. Kiley, Circuit Judge.

Hon. Walter J. Cummings, Circuit Judge.

No. 15246, 15563

HAZELTINE RESEARCH, INC., *Plaintiff and Counter-Defendant-Appellant,*

vs.

ZENITH RADIO CORPORATION, *Defendant and Counter-Claimant-Appellee.*

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, subsequent to the remandment to this Court by the Supreme Court of the United States for further proceedings in conformity with the opinion of said Court.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court for $6,297,391—before trebling—in this cause appealed

from be, and the same is hereby, VACATED, and that this cause be, and it is hereby, REMANDED to the said District Court for further proceedings consistent with the views expressed in the opinion of this Court filed this day.

It is further ordered and adjudged that the costs of these appeals in this Court be divided equally between the parties.

APPENDIX B.

28 U. S. C. § 1254 (1).

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

15 U. S. C. § 1.

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal: *Provided*, That nothing contained in sections 1-7 of this title shall render illegal, contracts or agreements prescribing minimum prices for the resale of a commodity which bears, or the label or container of which bears, the trademark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions, under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale, and the making of such contracts or agreements shall not be an unfair method of competition under section 45 of this title: *Provided further*, That the preceding proviso shall not make unlawful any contract or agreement, providing for the establishment or maintenance of minimum resale prices on any commodity herein involved, between manufacturers, or between pro-

ducers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other. Every person who shall make any contract or engage in any combination or conspiracy declared by sections 1-7 of this title to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

15 U. S. C. § 2.

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

15 U. S. C. § 15.

Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit including a reasonable attorney's fee.

15 U. S. C. § 26.

Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties,

against threatened loss or damage by a violation of the antitrust laws, including sections 13, 14, 18 and 19 of this title, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules such proceedings, and upon the execution of proper bond against damages for an injunction improvidently granted and a showing that the danger of irreparable loss or damage is immediate, a preliminary injunction may issue: Provided, That nothing herein contained shall be construed to entitle any person, firm, corporation or association, except the United States, to bring suit in equity for injunctive relief against any common carrier subject to the provisions of the Act to regulate commerce, approved February fourth, eighteen hundred and eighty-seven, in respect of any matter subject to the regulation, supervision, or other jurisdiction of the Interstate Commerce Commission.

15 U. S. C. § 16(b).

Whenever any civil or criminal proceeding is instituted by the United States to prevent, restrain, or punish violations of any of the antitrust laws, but not including an action under section 15a of this title, the running of the statute of limitations in respect of every private right of action arising under said laws and based in whole or in part on any matter complained of in said proceeding shall be suspended during the pendency thereof and for one year thereafter: *Provided, however*, That whenever the running of the statute of limitations in respect of a cause of action arising under section 15 of this title is suspended hereunder, any action to enforce such cause of action shall be forever barred unless commenced either within the period of suspension or within four years after the cause of action accrued.

Fed. Rules Civ. Proc., rule 12 (h), 28 U. S. C.

A party waives all defenses and objections which he does not present either by motion as hereinbefore provided, or if he has made no motion, in his answer or reply, except (1) that the defense of failure to state a claim upon which relief can be granted, the defense of failure to join an indispensable party, and the objection of failure to state a legal defense to a claim may also be made by a later pleading, if one is permitted, or by motion for judgment on the pleadings, or at the trial on the merits, and except (2) that whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action. The objection or defense, if made at the trial shall be disposed of as provided in Rule 15(b) in the light of any evidence that may have been received. (As amended Jan. 21, 1963, effective July 1, 1963 and in force at the time pertinent to this cause.)

Fed. Rules Civ. Proc., rule 52 (a), 28 U. S. C.

In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b).

APPENDIX C.

IN THE UNITED STATES COURT OF APPEALS
for the Seventh Circuit.

HAZELTINE RESEARCH, INC., *Appellant,* *vs.* ZENITH RADIO CORPORATION, *Appellee.*	Appeals from the United States District Court for the Northern District of Illinois, Eastern Division. No. 15246 No. 15563

MOTION TO DISQUALIFY JUDGE WALTER J. CUMMINGS, JR. FROM FURTHER PARTICIPATION IN ANY HEARING IN THIS COURT IN THIS CASE.

Now comes Zenith Radio Corporation, Appellee herein, by Thomas C. McConnell, its counsel and asks that Judge Walter J. Cummings, Jr. disqualify himself from any further participation in this case and for cause shows:

(1) That one of the issues sought to be raised by Hazeltine Research, Inc., Appellant, in further hearings in this cause is the effect of a certain release executed with others by Western Electric Co., a subsidiary of American Telephone and Telegraph Company, the appellant claiming that such release acts to release Hazeltine Research, Inc. as a conspirator with the Western Electric Company from

liability from acts occurring prior to the execution of such release. That in making this contention, Hazeltine Research, Inc. is compelled to and does allege that it was a co-conspirator with the Western Electric Company in the conspiracy which the Supreme Court of the United States has now held to be an illegal conspiracy violating Sections 1 and 2 of the Sherman Act.

(2) That at the time the said release was executed, Judge Walter J. Cummings, Jr. was attorney for the Western Electric Company and was actively engaged in defending that company now claimed to be the appellant's co-conspirator and was appearing continuously in court and making arguments in defense of his client's position that the conspiracy was legal under the antitrust laws. That one of the issues sought to be re-asserted here by Hazeltine Research, Inc. is the legality of the selfsame conspiracy held illegal by the Supreme Court.

(3) That the record in this case at p. 2129 of the Appendix, being plaintiff's exhibit No. 43 and as shown by the signature of Judge Cummings on appellee's exhibit No. 43 (A2129) shows that said Judge was then attorney of record for the Western Electric Company and signed the stipulation dismissing the cause of Zenith's counterclaim on behalf of Western Electric and therefore consummated a settlement of the cause for a consideration of some $10,000,000.

(4) That at the time of the said settlement and at the time the counterclaim was dismissed pursuant to the stipulation, the said Walter J. Cummings, Jr. told Thomas C. McConnell, then and now attorney for Zenith Radio Corporation, that he, Cummings, as its lawyer, had advised the Western Electric Company, a subsidiary of the telephone company, not to make a settlement because in his opinion Zenith could not prove its damages. That this is exactly

the position which was taken by this Court in the above-entitled cause in the hearing of which Judge Cummings was a member of the panel and which panel held that Zenith had shown no "fact of damage," that opinion being now reversed by the Supreme Court of the United States.

(5) That the fact that Judge Cummings participated as attorney, actively engaged in the litigation and not a mere attorney of record is shown by the transcripts of the proceedings which were filed as a part of the record in the United States District Court in Cause No. 48 C 1818 and of which Zenith has copies and can produce them for the inspection of this Court if the Court so requests.

(6) That since the same issues raised in that case are being raised here by Hazeltine Research, Inc., a co-conspirator with the Western Electric Company, Zenith may be forced to argue issues before a judge who appeared in an antagonistic position to Zenith and its attorneys and opposed each and every contention made by Zenith in that case which contentions involved the same illegal conspiracy and its effect on Zenith's Canadian business at an earlier period than here involved.

(7) That the reason Judge Cummings was not requested to disqualify himself at the time this case was originally heard was that Zenith's counsel had no knowledge, prior to the actual appearance on the bench of Judge Cummings, that he was going to participate as a judge in the case. That Zenith's counsel was present, prepared to argue the case and had no opportunity of consulting with his client so that he might have authority to make a motion of the kind and character presented here; that in view of the facts here presented Judge Cummings has the legal and ethical duty to recuse himself regardless of whether Zenith or its counsel makes a motion to that effect.

WHEREFORE, in the interests of justice and pursuant to the

principles set forth in *Roberson* v. *United States,* 249 F. 2d 737 at p. 741 a situation is presented "under which a judge should have disqualified himself" and therefore appellee Zenith Radio Corporation requests that Judge Walter J. Cummings, Jr. now disqualify himself from any further participation in this case.

ZENITH RADIO CORPORATION,
Appellee,
By THOMAS C. MCCONNELL,
Its Attorney.

STATE OF ILLINOIS }
COUNTY OF COOK } ss.

Thomas C. McConnell, being duly sworn on oath says that he has read and subscribed to the foregoing motion and that the facts therein stated are true.

THOMAS C. MCCONNELL.

Subscribed and sworn to before me, a Notary Public in and for the State and County aforesaid this 20th day of June, 1969.

STEPHANIE A. CHODERA,
Notary Public.

FILED
FEB 24 1970
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. ~~4117~~ 80

ZENITH RADIO CORPORATION, A CORPORATION,
Petitioner,

vs.

HAZELTINE RESEARCH, INC., A CORPORATION,
Respondent.

BRIEF OF HAZELTINE RESEARCH, INC. IN OPPOSITION TO ZENITH'S PETITION FOR A WRIT OF CERTIORARI

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 1117

ZENITH RADIO CORPORATION, A CORPORATION,
Petitioner,

vs.

HAZELTINE RESEARCH, INC., A CORPORATION,
Respondent.

BRIEF OF HAZELTINE RESEARCH, INC. IN OPPOSITION TO ZENITH'S PETITION FOR A WRIT OF CERTIORARI

FOREWORD

The most significant thing about Zenith's petition for a writ of certiorari is that in both substance and form it is substantially a verbatim copy of its petition for a writ of mandamus (Misc. No. 1338).

The ground for certiorari which Zenith asserts is precisely the same as in Zenith's petition for mandamus, namely, the question of alleged violation of the mandate of this Court by the Court of Appeals. Zenith says in its petition for certiorari (p. 2):

> "*The relief here sought* is a determination of *whether or not* the Court below has *disregarded* the mandate of this Court and in effect reversed the decision of this

> Court by vacating the judgment of the District Court awarding damages to Petitioner, Zenith Radio Corporation, for violation of the antitrust laws by Hazeltine Research, Inc. and the Canadian Patent Pool."[1]

This is the *same statement* as to "The relief here sought" which appeared at page 4 of Zenith's petition for writ of mandamus, except that the words "and in effect reversed the decision of this Court" have been added in the current petition. In other words, Zenith has filed two petitions asking for the same relief.

At the beginning of our Argument, we provide a brief comparison of the two petitions, showing their substantial identity (note 7, *infra*).

CITATIONS TO OPINION BELOW

The opinion of the Court of Appeals for the Seventh Circuit has now been printed in the official Federal Reporter. The citation is *Hazeltine Research, Inc.* v. *Zenith Radio Corporation*, 418 F.2d 21 (7th Cir. 1969). Since we have previously cited this opinion as "Slip Opinion . . ." in the briefs filed in opposition to Zenith's mandamus petition, we shall continue to do so in this brief. The slip opinion has been reproduced as Appendix A to this brief.

QUESTIONS PRESENTED

Zenith petitions for a writ of certiorari. Although Zenith sets forth nine "Questions Presented" instead of the seven asserted on its petition for writ of mandamus, the basic issue presented is precisely the same in both petitions (see p. 1, *supra*). This issue, as we have pointed out (HRI

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[1] Emphasis appearing in quotations has been added by us unless otherwise indicated.

Br. Opp. Mand. 2)[2] is: Whether the Court of Appeals, on remand for further proceedings following reversal by this Court on the single issue as to whether Zenith had proved some injury to its Canadian business, had the authority to rule on the affirmative defenses of Hazeltine Research, Inc. (HRI) and to remand for further hearings on the amount of recoverable damages, those issues having previously been left undecided both by the Court of Appeals and by this Court.

This basic question includes the subordinate issues:

(a) whether the Court of Appeals had authority to determine whether the affirmative defenses of release and limitations were in the case;

(b) having decided that these defenses were in the case and that they had been rejected by the trial court on the merits, whether the Court of Appeals had authority to determine that the trial court erred in that rejection; and

(c) having decided that the affirmative defenses barred Zenith's recovery of damages resulting from the acts of the Canadian pool prior to the release and to the limitations period, whether the Court of Appeals had authority to order further hearings

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[2] The following abbreviations are used in this brief:

Z. Pet. Mand.	Zenith's Motion and Petition for Mandamus
Z. Reply Mand.	Zenith's Reply to Brief of HRI in Opposition to Zenith's Petition for Mandamus
Z. Pet. Cert.	Zenith's Petition for Certiorari
HRI Br. Opp. Mand.	Brief of Hazeltine Research, Inc. in Opposition to Zenith's Petition for Mandamus
HRI Reply Br. Opp. Mand.	Reply Brief of Hazeltine Research, Inc. in Opposition to Zenith's Petition for Mandamus
A.	Citations to the printed Appendix

on the amount of recoverable damages in light of the fact that a major portion of the original damage award was based on such pre-release and pre-damage period conduct (see HRI Br. Opp. Mand. 2).

Zenith also purports to raise questions of alleged error by asserting that the Court of Appeals made a holding with regard to tolling of the Statute of Limitations (15 U.S.C. § 15b), and a holding limiting Zenith's damages to those flowing from a letter of June 5, 1959, when, in fact, the Court of Appeals made no such holdings (see pp. 33-38 and 32-33, *infra*).

STATEMENT OF THE CASE

Zenith's Statement of the Case again misstates both the decision of this Court and of the Court of Appeals on remand. Zenith's petition attempts to obscure the fact that this Court reversed the Court of Appeals' judgment as to Canada *solely* on the fact of damage issue, leaving the remaining undecided issues for consideration by the Court of Appeals. On remand, the Court of Appeals in no way disturbed or questioned the decision of this Court.

In view of Zenith's misstatements concerning these opinions, HRI sets forth the following additional statement of the pertinent facts (see also HRI Br. Opp. Mand. 3-9).

I. The Court of Appeals' Decision of December 19, 1967 (388 F.2d 25). HRI appealed from the antitrust damage judgments awarded by the trial court granting Zenith over $34,000,000 in treble damages based on Zenith's alleged loss of sales and profits from May 22, 1959 to May 22, 1963, claimed to have been caused by patent pools in Canada, England and Australia. On that appeal HRI urged several grounds for reversal, including failure to prove the fact of damage, the bars of the statute of limitations and

the 1957 releases in the RCA-Zenith litigation,[3] and the contention that the damages awarded were excessive. The Court of Appeals reversed the trial court's treble damage judgments as to all three countries *solely* on the basis of Zenith's failure to prove the "fact of damage," stating that:

> "We agree with HRI that Zenith failed to sustain the burden of proving the essential *fact* of damage in the relevant period. *We need pass on no other contention, therefore,* in reversing the judgment on the counterclaim" (388 F.2d at 35).

Thus the Court of Appeals' reversal was based solely on the failure to prove the fact of damage and the other issues were left undecided (see HRI Br. Opp. Mand. 3-4).

II. This Court's Decision of May 19, 1969 (395 U.S. 100). This Court, in reversing the Court of Appeals as to Canada, did so solely on the "fact of damage" question, carefully noting that there were several "major points" raised by HRI which the Court of Appeals had not yet passed on (395 U.S. at 113). This Court said:

> "We have concluded that *the Court of Appeals erred* in setting aside the District Court's decision *with respect to the fact of damage in Canada.* Zenith's evidence, although by no means conclusive, was sufficient to sustain the inference that Zenith had in fact been injured *to some extent* by the Canadian pool's re-

[3] HRI urged that the releases barred recovery for all present, past and future damages, including damages claimed to have been suffered during the period May 1959 to May 1963, resulting from acts of the pool taking place prior to the date of the releases on September 27, 1957, and that, as an alleged co-conspirator, HRI was entitled to assert this defense (see 395 U.S. at 113).

straints upon imports of radio and television sets" (395 U.S. at 114).[4]

Contrary to Zenith's representations, this Court did not decide the other issues on the Canadian damage claim raised by HRI in the Court of Appeals, but did comment on them:

(a) The Court referred to the question whether the trial court's failure to give effect to the defenses of release and limitations was a ruling on the merits or was on the ground of waiver, but pointed out that "the parties have not argued the matter" and stated it would not pass on this issue (395 U.S. at 117 n. 13) (see pp. 19-21, *infra*).

(b) The Court referred to the question of the effect of the 1957 releases, indicated their apparent relevance (395 U.S. at 113 n. 7), but did not rule on the effect to be given them (see p. 23, *infra*).

(c) The Court referred to the question whether the statute of limitations barred recovery of damages resulting from pre-damage period conduct, but pointed out that the matter had not been argued and stated it would not "deal with the question of whether damage period injury from pre-damage period conduct is recoverable . . ." (395 U.S. at 117 n. 13) (see pp. 23-24, *infra*).

(d) The Court recognized the potential effect of the defenses on the amount of recoverable damages, pointing out that the damages awarded by the trial court as to Canada had been on the assumption that absent the activities of the Canadian pool, Zenith "*would have had 16%* of

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[4] However, this Court agreed with the Court of Appeals in setting aside the judgments as to England and Australia on the ground that the "fact of damage" had not been proved (395 U.S. at 114). It also agreed that the judgments against Hazeltine Corporation were properly vacated (395 U.S. at 110).

the Canadian television market on May 22, 1959, and throughout the damage period *rather than its actual 3% share*" (395 U.S. at 116). The Court stated:

> "Since the failure to have 16% of the market on the first day of the damage period was ascribed to pool operations, *those operations must have occurred prior to May 22, 1959.* Some of the damages awarded, therefore, *necessarily resulted from pre-damage period conduct*" (395 U.S. at 116-17).

Thus, if held to apply, the affirmative defenses necessarily barred a major part of the $18,892,173 award of the trial court.

Having reversed the Court of Appeals' ruling solely on the fact of damage issue, this Court remanded "for further proceedings consistent with this opinion" (395 U.S. at 141). This "single issue" reversal left the remaining undecided issues for decision by the Court of Appeals (see pp. 13-16, *infra;* see also HRI Br. Opp. Mand. 11-16).

III. The Court of Appeals' Remand Decision of October 27, 1969 (418 F.2d 21; Slip Opinion). On remand the Court of Appeals did not disturb or question this Court's holding on the fact of damage but recognized it was bound by that holding. It considered only the questions which it had originally left undecided with respect to Canada, acknowledging that this Court had "concluded we erred in our determination that Zenith had failed to prove the 'fact' of damage in Canada" (Slip Opinion 2). The Court of Appeals concluded that the issues remaining before it on remand were the following:

> "(1) whether Zenith's injury during the statutory damage period resulted to any extent from HRI's conduct preceding that period and, if so, what effect releases given by Zenith in 1957 had on Zenith's recovery; (2) what effect the statute of limitations had on HRI's

liability; and (3) whether the award of damages was excessive. *These points had been raised before us by HRI in the first appeal, but we saw no need of passing on them in view of our reversal of the judgment for Zenith*" (Slip Opinion 2).

The Court of Appeals decided:

(a) that the defenses of release and limitations had not been waived, and that the trial court had considered and (erroneously) denied them on their merits (Slip Opinion 3);

(b) that HRI as an alleged joint tortfeasor was entitled to the benefit of the September 27, 1957 releases in the RCA-Zenith litigation and that these releases barred recovery for "past, present and *future damages* [emphasis by the Court] flowing from any misconduct of HRI prior to to the dates of the releases" (Slip Opinion 4); and

(c) that the limitations defense was a bar to Zenith's recovery for damages resulting from conduct which occurred prior to the start of the damage period (*i.e.*, prior to May 22, 1959) (Slip Opinion 4-5, 6-7), so that Zenith's recovery was limited to damages resulting from conduct "occurring in the damage period" (Slip Opinion 5).[5]

The bar to recovery imposed by the releases and statute of limitations necessarily reduced the amount of recoverable damages and, accordingly, the Court of Appeals remanded the case to the District Court for further hearings as to the amount of damages recoverable. In so doing, the Court of Appeals pointed to this Court's analysis which showed that the original award of $18,892,173 granted by

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[5] Contrary to Zenith's assertions, the question whether or not the statute of limitations is tolled as against a party in a civil action who was not a defendant in government litigation was not before the court (see pp. 33-38, *infra*).

the trial court was based on the assumption that but for pre-damage period conduct, Zenith would have started the four-year period with 16% of the market instead of the 3% it actually had, and that "some part of the damages awarded, therefore, *necessarily* resulted from pre-damage period conduct" (395 U.S. at 116-17; Slip Opinion 3-4). Since Zenith started the damage period with less than one-fifth of the market share which it claimed it should have had (3% instead of 16%), necessarily a major portion of the original award was for damages claimed to have resulted from pre-release and pre-damage period conduct. Thus, the Court of Appeals had the power and the duty to remand the case to the trial court for further hearings to determine the amount of damages resulting from damage causing conduct taking place during the period, excluding damages resulting from pre-damage period and pre-release conduct (Slip Opinion 7).[6]

SUMMARY OF ARGUMENT

No basis is presented for a writ of certiorari. The Court of Appeals did not exceed its authority under the mandate of this Court in *Zenith Radio Corporation* v. *Hazeltine Research, Inc.*, 395 U.S. 100 (1969), and did not make the alleged "holdings" which Zenith asserts as constituting error.

The Court of Appeals, in its original decision, held only that Zenith had failed to prove the essential fact of damage. HRI had urged a number of other grounds for reversal in

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[6] Contrary to Zenith's assertion the Court of Appeals did not hold that on remand Zenith's recovery was limited to any damages resulting from the June 5, 1959 letter from the pool to Zenith, but pointed to the letter as an example of conduct taking place during the period which could form the basis for a damage award (see pp. 32-33, *infra*).

the Court of Appeals, including the points that a recovery of all or part of the damages was barred by the affirmative defenses of release and limitations, and that the damage award was excessive. However, the Court of Appeals, concluding that the fact of damage had not been proved, did not find it necessary to rule on any of these other grounds for reversal.

This Court reversed that part of the decision of the Court of Appeals which held that Zenith failed to prove the fact of damage as to Canada. This Court, like the Court of Appeals, did not pass upon the question whether the defenses of the statute of limitations and release were in the case, nor as to their legal effect, nor the amount of damages recoverable in light of those defenses. However, the Court did comment upon these defenses and their potential effect to limit the amount of recoverable damages. Having reversed solely on the fact of damage issue this Court remanded the case to the Court of Appeals "for further proceedings consistent with this opinion" (395 U.S. at 141).

Under the mandate of this Court, the Court of Appeals had the authority, and the duty, to decide those issues left undecided by its previous decision and not passed on by this Court. The Court of Appeals therefore had the authority to determine whether the affirmative defenses of release and of limitations were in the case, to decide their legal effect, and to order further hearings in the trial court on the amount of recoverable damages, in light of its decision that the defenses of release and limitations barred recovery of damages resulting from pre-release and pre-damage period conduct.

The further hearings will not constitute a "new trial," but regardless of how designated, the Court of Appeals had

the power to order the hearings. The trial court had made erroneous rulings of law in failing to recognize that the release and statute of limitations barred recovery based on pre-damage and pre-release period conduct, and the hearings are necessary to permit a finding as to the amount of recoverable damage.

The Court of Appeals did not hold that Zenith's recovery is limited to damages resulting from the June 5, 1959 letter from the Canadian patent pool to Zenith. Rather it held that Zenith is entitled to recover any damages occurring during the damage period as the result of conduct which took place during the damage period.

The Court of Appeals did not make a holding that the statute of limitations cannot be tolled by government litigation to which a defendant in a civil suit was not a party, but pointed out that the issue of tolling was not raised in the trial court and was not before the Court of Appeals. The fact is that Zenith affirmatively foreclosed itself from asserting tolling for the purpose of claiming recovery of damages resulting from conduct taking place prior to May 22, 1959 (the start of the damage period). To obtain leave to file its counterclaim on May 22, 1963, over three years after its answer, Zenith represented by its motion and sworn affidavit of its counsel that the matters causing the damages for which it sought recovery had occurred after the filing of its answer, i.e., after April 7, 1960.

Zenith's novel theory that it should be granted a treble damage judgment of $18,892,173, even though a major part of the alleged damages is barred by the 1957 releases and statute of limitations, has no basis. There is also no basis for Zenith's attempted pose as an embattled litigant being denied justice by a prejudiced Court of Appeals. In fact, Zenith is attempting to obtain a recovery of millions of dollars to which it is not legally entitled.

ARGUMENT

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED

Zenith seeks the same relief (on the same grounds) in its certiorari petition as it did in its petition for mandamus. Thus, Zenith states in both petitions that "The relief here sought is a determination of whether or not the Court below has disregarded the mandate of this Court . . ." (Z. Pet. Mand. 4; Z. Pet. Cert. 2). According to Zenith, this Court's opinion stripped the Court of Appeals of the power to make any ruling other than to reinstate the original treble damage award of $18,892,173 for Canada.

For the Court's convenience, a brief comparison appears in the footnote, showing the substantial identity between Zenith's two petitions.[7]

As we have pointed out (HRI Br. Opp. Mand. 10-39), there is no merit in any of Zenith's arguments.

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[7] The petition for certiorari lists nine "Questions Presented" (pp. 2-4), in substance covering the same ground as the seven "Questions Presented" in the petition for mandamus (Z. Pet. Mand. 4-6). In several instances the questions are identical. The Statement of the Case is identical in both petitions except in some argumentative additions at the end (Z. Pet. Cert. 7). Both Statements are inaccurate and misleading.

As to the Argument, Section I in the petition for certiorari (pp. 8-15), is substantially a verbatim copy of Section I in the petition for mandamus (pp. 9-16); the proposition of the two petitions are different in language but not in substance. Sections II, III and IV of the petition for certiorari (pp. 15-17, 18-20, 20-23, respectively), are substantially the same as Section II of the petition for mandamus (pp. 16-23), in effect a subdivided version. Section V of the petition for certiorari (pp. 24-25) is an abbreviated version of Section III of the petition for mandamus (pp. 23-25).

I. Zenith's Contention That This Court's Mandate Foreclosed the Court of Appeals on Remand From Ruling on Undecided Issues is Contradicted by the Decisions of This Court.

This contention was answered at pages 11-16 of HRI's brief in opposition to Zenith's mandamus petition.

The substance of Zenith's "lack of jurisdiction" argument is that this Court's remand to the Court of Appeals "for further proceedings consistent with this opinion" (395 U.S. at 141) did not give the Court of Appeals jurisdiction or authority to pass on the remaining undecided issues, and that on remand a lower court has no authority to pass on the remaining undecided issues unless this Court has specifically listed those issues and specifically directed the lower court to pass on them (see, *e.g.*, Z. Pet. Cert. 7, 9, 17, 24).

Contrary to Zenith's contentions, the Court of Appeals had the power, and the duty, to rule on the issues of HRI's affirmative defenses and the amount of recoverable damages. The cases cited in HRI's brief in opposition to Zenith's mandamus petition (pp. 12-15) demonstrate conclusively that a lower court has the authority to consider undecided issues on remand following a "single issue" reversal by this Court. This procedure has been well established at least since *Ex parte French*, 91 U.S. 423 (1875). In that case, several defenses had initially been pleaded but the trial court held for defendant on one defense, without passing on the others. This Court had, in an appeal from that decision, reversed the trial court on the ground that the ruling was erroneous and "remanded with directions to proceed in conformity to this opinion," *French* v. *Edwards*, 88 U.S. (21 Wall.) 147, 151 (1874). The lower court, on remand, set the case down for a new trial and the defendant, like Zenith here, sought review in this Court, contend-

ing that the Court's mandate required entry of judgment in his favor. In denying review the Court held that:

> "The finding brought here for review was special, *and met only a part of the issues.* If the conclusion of law to which the court came was correct, the other issues were immaterial. *The case was disposed of without reaching them.* We have, however, determined that the facts found were not sufficient to justify the conclusion reached; and have ordered the court to proceed with the case, notwithstanding the finding. *In effect, we have decided that the court erred in not proceeding to try the other issues. Our action only precludes that court from adjudging in favor of the defendants upon the special facts found and sent here for our opinion. In all other respects, it is at liberty to proceed in such manner as, according to its judgment, justice may require*" (91 U.S. at 426).[8]

Zenith persists in urging that this Court's decision in *In re Sanford Fork & Tool Co.*, 160 U.S. 247 (1895) supports its contention that the Court of Appeals was without power to rule as it did in this case (Z. Pet. Cert. 8-9; see also Z. Pet. Mand. 9-10). However, as HRI pointed out (HRI Br. Opp. Mand. 13), that case expressly sanctions the procedure employed by the Court of Appeals in this case. In *Sanford,* during proceedings in the circuit court following reversal by this Court on a single issue, defendants moved for judgment in their favor, contending that the mandate of this Court required the entry of such a judgment. When the lower court denied the motion, defendants sought a writ of mandamus. In denying the petition, this Court held that "the Circuit Court may consider and decide

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[8] See *Sprague* v. *Ticonic National Bank,* 307 U.S. 161, 168 (1939); *General Investment Co.* v. *Lake Shore & Michigan Southern Ry.,* 260 U.S. 261, 284-85 (1922); see also cases cited at note 9, *infra.*

any matters left open by the mandate of this court" (160 U.S. at 256).

When a case is reversed by this Court on one issue and remanded, it is neither necessary nor usual to give express instructions to the lower court to decide the remaining issues. HRI cited numerous decisions of this Court showing that a remand "for further proceedings consistent with this opinion" constitutes all the instruction necessary to the lower court to decide any remaining issues, consistent with the opinion (HRI Br. Opp. Mand. 14). For the Court's convenience, those citations are set forth again in the footnote.[9]

As previously noted (HRI Br. Opp. Mand. 15), when an appellate court intends to depart from the normal procedure in remanding a case and takes the unusual step of foreclosing consideration of remaining issues, "it is to

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[9] *Ex parte French*, 91 U.S. 423 (1875) (discussed pp. 13-14, *supra*); *In re Sanford Fork & Tool Co.*, 160 U.S. 247, 258 (1895) (remand by this Court for further proceedings after a single issue reversal left the lower court free to decide the remaining issues and did not require entry of judgment for either party); *Sprague* v. *Ticonic National Bank*, 307 U.S. 161, 168 (1939) (mandate controls all matters within its compass, but the lower court is free as to all other issues on remand); *General Investment Co.* v. *Lake Shore & Michigan Southern Ry.*, 260 U.S. 261, 284-85 (1922) (reversal by an appellate court on single issue does not preclude consideration of other issues in lower court); *Utah Pie Co.* v. *Continental Baking Co.*, 386 U.S. 685, 704 (1967), and following remand, *Continental Baking Co.* v. *Utah Pie Co.*, 396 F.2d 161, 163, 195-96 (10th Cir.), *cert. denied*, 393 U.S. 860 (1968) (following a single issue reversal by this Court and remand "for further proceedings," the court of appeals decided the remaining issues and remanded for a new trial; Utah Pie petitioned for a writ of certiorari, contending that the action of the Tenth Circuit was in conflict with this Court's decision on the single issue, and this Court denied certiorari).

be presumed that it would . . . [do] so unequivocally and directly by means of language, form of decree and mandate generally employed for that purpose" *Rogers* v. *Hill*, 289 U.S. 582, 587 (1933). That is precisely what this Court did in *Perkins* v. *Standard Oil Co.*, . . . U.S. . . . ., 89 S.Ct. 1871 (1969), decided by this Court on June 16, 1969, less than a month after the decision in the instant case. That was a treble damage action in which the Court of Appeals had set aside the verdict of the jury and judgment of the trial court, and this Court, following its reversal of the Court of Appeals' ruling, stated:

> "The jury's verdict and judgment should be reinstated. It is so ordered.
>
> "Verdict and judgment reinstated" (89 S.Ct. at 1875).[10]

In the instant case this Court did not foreclose the Court of Appeals from considering undecided issues and did not order that the trial court's judgment as to Canada for $18,892,173 "should be reinstated." Instead, it remanded "for further proceedings" so that the Court of Appeals could proceed to pass upon the undecided issues.

II. This Court Decided Only That Zenith Had Established the Fact of Damage as to Canada and Did Not Rule on Other Issues Relating to the Canadian Damage Claim.

This point was discussed at pages 16-18 of HRI's brief in opposition to the petition for mandamus.

In reviewing the decision of the Court of Appeals this Court pointed out that although HRI raised a number of "major points" in the Court of Appeals, including the de-

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[10] See *Crumady* v. *The J. H. Fisser*, 358 U.S. 423, 429 (1959).

fenses of statute of limitations and release and the issue as to the amount of recoverable damage, the Court of Appeals had reversed the trial court's judgment as to Canada *solely* on the basis of its "overriding judgment" that Zenith had not established the fact of damage (395 U.S. at 113, 118).

This Court also pointed out that the Court of Appeals had reversed the treble damage awards solely on the fact of damage issue *"without reaching* any of the other issues presented by the appeal on this phase of the case" (395 U.S. at 107) and again, that:

> "*Passing the other issues* pressed by HRI, including the limitations defense, the Court of Appeals held that Zenith had failed to prove any injury to its export business during the damage period . . ." (395 U.S. at 113).

Although this Court agreed with the decisions of the Court of Appeals in setting aside the judgments as to England and Australia (395 U.S. at 114), it reversed the Court of Appeals as to Canada solely because the Court of Appeals had erred in concluding that the "fact of damage" had not been proved, stating:

> "We have concluded that the Court of Appeals *erred* in setting aside the District Court's decision *with respect to the fact of damage in Canada.* Zenith's evidence, although by no means conclusive, was sufficient to sustain the inference that Zenith had *in fact been injured to some extent* by the Canadian pool's restraints upon imports of radio and television sets" (395 U.S. at 114).

This Court made it clear that its decision was limited to the issue of whether there had been proof of some injury to Zenith's business, *i.e.,* fact of damage, and was not a

ruling on the amount, saying that proof that Zenith had been injured "to some extent" met Zenith's burden of proving "the fact of damage," and that "inquiry *beyond this minimum point goes only to the amount* and not the fact of damage" (395 U.S. at 114 & n. 9).

In reversing the Court of Appeals' holding that no injury during the damage period was shown resulting "from pool activities either *before or after* the beginning of the damage period" (395 U.S. at 113), this Court pointed out that the fact of some damage was shown by the record to have resulted not only from pre-damage period conduct but also from conduct during the damage period. The Court held that the evidence warranted "the inference that CRPL's *past conduct* interfered with and made more difficult the distribution of Zenith products in 1959 and later years" (395 U.S. at 118), and also held "that the record evidence is sufficient to support a finding of damage resulting from events occurring *after* the beginning of the damage period" (395 U.S. at 119).

The effect of these conclusions was that even if Zenith's right to a recovery for damages based on pre-damage period conduct was barred by limitations or by the September 27, 1957 releases, *nevertheless* Zenith could assert a claim to recovery to the extent that the damages suffered during the damage period were due to damage period conduct. Thus, it was not necessary for this Court to rule upon the applicability or effect of the defenses of limitations or release or the *amount* of damage issue. Indeed, it would have been highly unusual for this Court to have done so in view of its limited holding and the limited holding of the Court of Appeals. The defenses of limitation and release and the question of the amount of recoverable damage, had no relevancy in the determination of the *fact* of damage issue (see pp. 25-26, *infra*).

III. The Decision of the Court of Appeals on Remand Was Clearly Within the Authority of This Court's Mandate.

A. The Court of Appeals Did Not Question the Decision by This Court on the Fact of Damage Issue but Considered Only the Questions Left Open by its Previous Opinion and Left Undecided by This Court.

This point was discussed at page 19 of HRI's brief in opposition to the mandamus petition.

The Court of Appeals in its second decision recognized that its ruling on the "fact of damage in Canada" had been reversed, that it was bound by that decision, and then proceeded to pass on the issues of release and limitations and their effect on the amount of recoverable damages, stating:

> "These points had been raised before us by HRI in the first appeal, but we saw no need of passing on them in view of our reversal of the judgment for Zenith" (Slip Opinion 2).

B. The Court of Appeals Had the Authority to Rule on Whether the Affirmative Defenses Were in the Case.

This point was discussed at pages 19-24 of HRI's brief in opposition to the petition for mandamus.

This Court referred to the question whether the defenses of release and limitations were in fact in the case, pointing out that the trial court had over Zenith's objection granted "leave to file" these defenses prior to entry of judgment, and then "without further mention of these defenses, forthwith refused to set aside or remand the damage award as to Canada," leaving open the question whether the trial court's action was based on a rejection of the defenses on the merits or on the ground of waiver (395 U.S. at 117

n. 13). Thus, this Court stated, the trial court "*either* reject[ed] the statute of limitations defense *or* consider[ed] it to have been waived," but that:

> "The parties have *not argued* the matter here, and *we make no further effort to penetrate the confusion surrounding this issue* [*i.e.*, whether the defenses were rejected on the merits or on the ground of waiver] or to deal with the question of whether damage period injury from pre-damage period conduct is recoverable where an unwaived statute of limitations defense is properly asserted" (395 U.S. at 117 n. 13).[11]

The Court of Appeals ruled on this undecided question, as it had an obligation to do, and decided that the trial court's failure to give effect to the defenses was on the (erroneous) ground that they had no merit, and not on the ground of waiver. Pointing out that the trial court permitted the defenses to be filed over Zenith's objections, and then denied HRI's motion to dismiss based on the defenses, the Court of Appeals stated:

> "It is our view that the court's ruling was *not* on the basis of *waiver, but* because the defenses on *their merits* did not bar Zenith's recovery. We turn therefore to consideration of the correctness of the district court's ruling" (Slip Opinion 3).

Zenith repeats its previous argument that this Court ruled that the defenses had been waived, because of its reference to the affirmative defenses as "belatedly raised" (in the sense that they had not been pleaded in the original answer to the counterclaim), and argues that by use of the words "unwaived" and "properly asserted," this Court had

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[11] Since the Court was referring to both defenses of limitations and release in the discussion and referred to the fact that the trial court had granted leave to file both defenses, the statements in this Court's footnote 13 concerning the limitations defense obviously applied to both defenses.

thereby made a "clear holding that the trial court had properly ruled that those defenses were not in the case" (Z. Pet. Cert. 11). As pointed out in answering this same argument previously (HRI Br. Opp. Mand. 21 n. 10), these words were used in connection with the statement of this Court that it was *not ruling* on the question of waiver, or the effect of the defenses if properly asserted (395 U.S. at 117 n. 13). Moreover, the Court was clearly aware that the Court of Appeals had not yet ruled on these defenses (395 U.S. at 113).

Although Zenith attacks the Court of Appeals' ruling on the false ground of lack of jurisdiction to rule, it should be pointed out again (see HRI Br. Opp. Mand. 21-24) that the record amply supports the correctness of the Court of Appeals' ruling. The trial court granted leave to file these pleas over Zenith's objection that "I think it is too late" (A. 3037). The trial court clearly understood that by its motion HRI was "seeking to file these new pleadings" (A. 3037) and granted leave to file them (A. 3037) *nunc pro tunc* as of April 1, 1965, before entry of judgment (Court of Appeals Appendix 2043). After the defenses were pleaded (A. 3049-53), HRI's motion to dismiss the counterclaim on the basis of the defenses was filed (A. 3048), denied (A. 3062), and judgment thereafter entered as to Canada (A. 3078-80).

If the trial court had considered the defenses waived, it would not have granted leave to file them over Zenith's objection (see, *e.g., Groninger* v. *Davison,* 364 F.2d 638, 639-40 (8th Cir. 1966) (grant of leave to file limitations defense held to negate any contention that the trial court considered the defense waived); see also HRI Br. Opp. Mand. 22-23). Moreover, Zenith's argument that failure to file the defenses with the original answer is "final and conclusive" (Z. Pet. Cert. 10), completely ignores the cases which we previously cited (HRI Br. Opp. Mand. 23), which

show that the trial court has discretion to permit amendment when justice requires (see, *e.g.*, *Emich Motors Corp.* v. *General Motors Corp.*, 229 F.2d 714, 717-18 (7th Cir. 1956)).

The grant of leave to file these defenses was particularly appropriate here because the defenses were not relevant to the counterclaim as pleaded and became relevant only after the trial and the findings prepared by Zenith and adopted by the trial court, which for the first time revealed that Zenith was claiming damages flowing from pre-damage period conduct (see HRI Br. Opp. Mand. 24; pp. 35-37, *infra*).

It is apparent that in failing to give any effect to the defenses of limitations and releases, the trial court erroneously believed they could not constitute a meritorious defense, for this Court pointed out (395 U.S. at 116), as did the Court of Appeals (Slip Opinion 3), that "the trial court apparently deemed it immaterial whether the damage-causing acts occurred before or after the start of the damage period" (see HRI Br. Opp. Mand. 24).

Indeed, as we have previously pointed out (HRI Br. Opp. Mand. 24), Zenith has heretofore admitted that the trial court did grant leave to file the pleas, for at page 16 of its reply brief to this Court, Zenith said:

> "The trial court *permitted the filing* of the pleas as of a date a year after the trial (A. 3037), and then promptly overruled the motion to dismiss the counterclaim on this ground (A. 3037)."

C. The Court of Appeals Had the Authority to Rule on the Effect of the Affirmative Defenses.

This point is reviewed at pages 25-28 of HRI's brief in opposition to the petition for mandamus.

Since the effect of the affirmative defenses on the amount of recoverable damages was not ruled on in the original

decision by the Court of Appeals, this Court did not decide the effect to be given to them. Rather, it left it to the Court of Appeals to decide whether they were in the case, and if so, what their effect might be (pp. 6-7, *supra*). This Court did, however, indicate the potential significance of those defenses on the amount of recoverable damages.

With respect to the September 27, 1957 releases in the RCA-Zenith litigation this Court did not rule on their effect, but it observed that "the 1957 release appears to be relevant only to Zenith's claim for injury to its Canadian trade . . ." (395 U.S. at 113 n. 7).[12] The Court of Appeals was clearly within the authority of this Court's mandate when it decided the effect of the releases on recovery of damages (Slip Opinion 4).

As concerns the limitations defense, this Court stated that although the defense was one of HRI's "major points" which had not been reached in the Court of Appeals (395 U.S. at 113), "the parties have not argued the matter here," and that:

> "*we make no further effort . . . to deal with the question of whether damage period injury from pre-damage period conduct is recoverable* where an un-

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[12] Irrespective of the application of the statute of limitations, some substantial portion of Zenith's damage claim was traceable to acts occurring prior to the September 1957 releases, and was thus barred if the releases were given effect. Indeed, in its proposed findings, Zenith relied on conduct dating back to *1926* as a basis for recovery (Findings XXV- XXX, XXXVI, A. 2903-06, 2908). Zenith entered the Canadian market in 1958 following the release (A. 2905), and this Court pointed out that "it could also rationally be found from the evidence that Zenith, beginning in 1958, could not have reached its maximum potential by May 22, 1959, that the pool had effectively prevented an earlier beginning [*i.e.*, before 1958], and that Zenith therefore suffered damage during the damage period from having a smaller share of the market than it would have had if the pool had never existed" (395 U.S. at 118-19).

waived statute of limitations defense is properly asserted" (395 U.S. at 117 n. 13).

The Court of Appeals was therefore clearly within its power under this Court's mandate when it decided this issue on remand.

Zenith's attack on the rulings by the Court of Appeals on these defenses is primarily directed to the argument that the Court of Appeals had no power to rule, rather than on the correctness of the rulings as a matter of law (see Questions Presented 2-3, Z. Pet. Cert. 2). In any event, the Court of Appeals was clearly correct in its rulings on the effect of the affirmative defenses.

As to the release defense, the cases relied on by the Court of Appeals, as well as the language of the releases themselves, amply support the conclusion that HRI, as an alleged co-conspirator, had the benefit of the releases and that they barred recovery of "past, present and *future damages*" [emphasis by the Court] resulting from acts taking place prior to the date of the releases (Slip Opinion 4; A. 3051-52). Thus, any damages suffered by Zenith during the 1959-1963 period as a result of pool activities taking place prior to September 27, 1957, including any interference with the build-up of a Canadian market from which Zenith could have profited during the 1959-1963 period, were barred.

As concerns the limitations defense, the Court of Appeals' ruling that the statute bars recovery of damages resulting from pre-damage period conduct (Slip Opinion 4-5, 6-7) is entirely in accord with the overwhelming weight of authority (see cases cited Slip Opinion 4-5).

Zenith makes a variety of miscellaneous arguments to the effect that the Court of Appeals should be considered to have no jurisdiction to rule on HRI's affirmative defenses or

to remand for further proceedings in light of those rulings. We have answered all these arguments previously (see HRI Br. Opp. Mand. 10-39). However, since Zenith persists in contending that this Court made various rulings which stripped the Court of Appeals of authority to act, it is appropriate to comment briefly here on the "holdings" which Zenith ascribes to this Court's decision.

At page 9 of its current petition Zenith asserts that in order to conclude that it had authority to take action, "the court below had to reverse this Court on three important and controlling decisions in this case" (see also Z. Pet. Mand. 10-11). According to Zenith these "controlling decisions" were:

> "First, the holding of this Court that the defenses of limitations and release were 'belatedly raised' and therefore waived. Second, that acts showing fact of damage outside the damage period were not barred by release or limitations; and third, that acts subsequent to May 22, 1959 were sufficient to support the damage findings."

No such rulings were made by this Court:

1. As to the contention that this Court held HRI's affirmative defenses waived, as we have already shown (see pp. 19-21, *supra;* see also HRI Br. Opp. Mand. 19-21), this Court pointed out unequivocally that it was *not* ruling on the question whether the defenses were waived (395 U.S. at 117 n. 13).

2. Zenith's contention that this Court held that damages based on pre-damage period conduct were not barred by the defenses of release and limitations (see Z. Pet. Cert. 13-14, 22-23; Z. Pet. Mand. 13-14, 22) is based on the argument that "if pre-damage period conduct can be considered on the fact of damage issue, it must be relevant and com-

petent evidence as to the amount of damage" (Z. Pet. Cert. 12; Z. Pet. Mand. 13). This is a complete *non sequitur*.

As we have pointed out (HRI Br. Opp. Mand. 27-28; see pp. 18-19, *supra*), in ruling on the fact of damage issue this Court was considering only whether the Court of Appeals was correct in its holding "that Zenith had not been damaged after May 22, 1959, by any act of the pool, whether occurring before or after that date" (395 U.S. at 118). The issue considered was the ruling of the Court of Appeals on the question of injury and causation (*i.e.*, fact of damage), and although the affirmative defenses might later be held on remand to constitute a legal bar to recovery of a portion of the original amount of damages awarded, that had nothing to do with the question of whether the Canadian pool had actually injured Zenith's business. Therefore, it was unnecessary for this Court to consider these affirmative defenses in determining the issue of fact of damage. However, it was appropriate for this Court to consider pre-damage period conduct (as well as damage period conduct) on the fact of damage question, because pre-damage period conduct could be the basis for additional recovery if the Court of Appeals should decide *either* that the affirmative defenses had been waived *or* that they did not bar recovery based on pre-damage period conduct. It should be noted that in any event, Zenith could recover damages to the extent they resulted from damage period conduct.

3. In again arguing that this Court held "that acts subsequent to May 22, 1959 were sufficient to support the damage findings" (Z. Pet. Cert. 9, Z. Pet. Mand. 11), Zenith seeks to obscure the fact that this Court's ruling related *solely* to the fact of damage issue (395 U.S. at 114 n. 9). Moreover, in describing the measure of damages allowed by the trial court, this Court made it unequivocally clear that the $18,892,173 treble damage award *could not* be sustained solely on the basis of acts of the Canadian pool subsequent to May 22, 1959, when it stated:

> "Some part of the damages awarded, therefore, necessarily resulted from pre-damage period conduct" (395 U.S. at 116-17).

In fact, since the damage award was based on the assumption that Zenith should have started the damage period with an established market of 16%, rather than the 3% it actually had, it was obvious that a *very large part* of the award was based on pre-damage period conduct.

Clearly, the reason that (1) the Court reviewed damage period conduct separately from pre-damage period conduct—(2) the Court pointed out the extent to which the original damage award was based on pre-damage period conduct—(3) the Court pointed to the existence of the issue as to whether or not the affirmative defenses had been waived—(4) the Court pointed out that it was not deciding the question whether or not recovery could be had on the basis of pre-damage period conduct—and (5) the Court, without deciding the issue, observed that the release "appears to be relevant" (395 U.S. at 113 n. 7)—was to point out the questions remaining to be decided by the Court of Appeals and to give the court below the benefit and guidance of this Court's comments on these undecided issues.

D. The Court of Appeals Had the Authority to Order Further Hearings on the Question of the Amount of Recoverable Damages.

This point was previously discussed at pages 28-31 of HRI's brief in opposition to the mandamus petition.

This Court pointed out the extent to which the original damage award had been based on pre-damage period conduct, stating:

> "Damages were awarded on the assumption that Zenith, absent the conspiracy, would have had 16% of

> the Canadian television market on May 22, 1959, and throughout the damage period rather than its actual 3% share. Since the failure to have 16% of the market on the first day of the damage period was ascribed to pool operations, *those operations must have occurred prior* to May 22, 1959. Some part of the damages awarded, therefore, *necessarily resulted from pre-damage period conduct*" (395 U.S. at 116-17).[13]

In other words, since Zenith had only *3%* of the market at the beginning of the damage period rather than the *16%* it alleged it should have had, this Court was in effect pointing out that *over 75% of Zenith's asserted lack of beginning market* share (13%/16%) was, on Zenith's own theory, ascribed to pre-damage period and pre-release conduct.

Under these circumstances it was obvious that a major portion of the original $18,892,173 damage award was based on pre-damage period conduct, recovery of which was barred, and there was no evidence or finding as to *what part* of the damage award resulted from damage period conduct. Accordingly, the Court of Appeals was clearly within the authority of this Court's mandate when it remanded the case to the trial court and stated that:

> "Accordingly, we think that HRI should have—what it was not given at the trial—an opportunity to introduce testimony, in support of its defense of statute of limitations, aimed at excluding from recovery damages flowing from pre-period 'damage-causing' acts, as well as an opportunity to introduce evidence to show that Zenith's damage flowing from 'damage-causing' acts within the period did not amount to $6,297,391.
>
> "The judgment for $6,297,391—before trebling— is

[13] Zenith has repeatedly attempted to dissipate the impact of this Court's analysis by quoting the first sentence of the statement and omitting all reference to the last two sentences (Z. Pet. Cert. 6, Z. Pet. Mand. 7-8, Z. Reply Mand. 3).

> vacated and the cause is remanded for further proceedings consistent with the views expressed in this opinion" (Slip Opinion 7).

Zenith persists in attempting to create the false impression that this Court decided the amount of damage issue without mentioning it, by asserting that "At pp. 147-149 of the HRI main brief in this court the amount of petitioner's [Zenith's] damages was argued at length" (Z. Pet. Cert. 24). This is not the fact. HRI's brief expressly stated:

> "*Zenith* argues the subject of the alleged *amount* of damages in England, Australia, and Canada (Z. Br. 26-28, 53, 56, 76-85), *but that issue is not before this Court.* Although it was raised in the Court of Appeals, it was not decided for that court based its decision entirely on the failure of Zenith to prove damaging impact from pool activities."

HRI commented briefly on Zenith's erroneous contentions only for the purpose of pointing out the nature and extent of the undecided questions (pp. 147-49).

The fact that this Court was limiting its decision to the fact of damage question and that it was not deciding any question concerning the amount of damages is clearly shown by the Court's statement that the fact of damage question required only "proof of *some* damage [emphasis by this Court] flowing from the unlawful conspiracy," and its statement that any "*inquiry beyond this minimum point goes only to the amount and not the fact of damage*" (395 U.S. at 114 n. 9).

IV. There Is No Basis for Zenith's "New Trial" Argument.

This point was previously answered at pages 31-32 of HRI's brief in opposition to the mandamus petition.

In an effort to show that the action taken on remand by the Court of Appeals was unauthorized, Zenith again argues that this Court did not "disturb" the trial court's "denial of a new trial" (Z. Pet. Cert. 24; see also Z. Pet. Mand. 17). Zenith's petition repeats the same "new trial" assertions (Z. Pet. Cert. 3, 8-9, 14-15, 24-25) which appeared in its petition for mandamus (Z. Pet. Mand. 5, 9, 16, 17, 21, 22, 23), suggesting that the issue involved here is a question of a "new trial" as to Canada and whether there has been a showing of "newly discovered evidence" or "abuse of discretion" by the trial court (Z. Pet. Cert. 15-16).

In view of Zenith's persistent misstatement of the facts, it must be pointed out again that HRI's motion to the trial court was not for a "new trial" but for a reopening of proofs and for "further hearings" before entry of judgment, the motion being based in part on the defenses of release and limitations (A. 2939, 2951). The trial court refused to order such further hearings as to Canada because it erroneously believed that the defenses had no merit (see pp. 19-22, *supra*). Thus the case does not involve questions of "abuse of discretion" or "newly discovered evidence" but the fact of *erroneous rulings of law* by the trial court on the issue of the merit of these defenses, which, when corrected by the Court of Appeals now require *further hearings* on the amount of damages, since the original award included alleged damages which were barred by the defenses of release and limitations.

Even if HRIs' motion *had* been for a new trial, however, this Court's failure to disturb the trial court's ruling would have been of no significance to the issue whether the Court of Appeals had authority to order further proceedings. This Court did not "disturb" the trial court's denial of HRI's motion for the obvious reason that the only issue it

decided was the fact of damage, and it left the other issues for decision by the Court of Appeals on remand. The determination whether further proceedings in the trial court were necessary could only be made *after* the Court of Appeals had ruled on HRI's other "major points" of appeal.

Zenith also incorrectly asserts that the remand for further hearings is contrary to the admonition of this Court that "the court below not attempt to deal with *questions of fact 'de novo'* and to follow the teaching and rationale of the *Bigelow* case" (Z. Pet. Cert. 14, Z. Pet. Mand. 15). In *Bigelow* v. *RKO Radio Pictures*, 327 U.S. 251 (1946), the Court of Appeals had reversed a treble damage judgment on the ground that there was not sufficient evidence to sustain the verdict of the jury on the facts. In the instant case the Court of Appeals had before it and reversed the trial court on *questions of law*, namely, whether the defenses of release or limitations barred recovery of damages based on pre-release and pre-damage period conduct. Contrary to Zenith's contentions (Z. Pet. Cert. 15), in remanding for further proceedings to give effect to these defenses, the Court of Appeals was not challenging the "trial court's damage findings in Canada." As this Court specifically pointed out, the trial court's findings as to the amount of damages included damages which "necessarily" resulted from pre-damage period conduct (395 U.S. at 116-17). In other words, there *were no findings* as to amount of damages based solely on damage period conduct, and the necessity for further hearings in the light of the affirmative defenses is clear.[14]

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[14] Zenith's current petition states that "Counsel for HRI now concede that only a question of law was involved and this Court did not in any way disturb the trial court's decision" (Z. Pet. Cert. 16). Apparently Zenith is trying to create the mis-impression that HRI's counsel agreed that the issue of a "new trial" was considered

The simple facts are: (a) under this Court's mandate the Court of Appeals was required to determine the applicability and effect of the defenses of release and limitations, and to rule on the question of amount of recoverable damages; (b) the Court of Appeals determined that these defenses apply and bar recovery of damages based on pre-release and pre-limitations acts; and (c) since the trial court's award of damages as to Canada included substantial damages recovery of which is barred by those defenses, there was no evidence and no findings as to the amount of damages which are recoverable, and it was thus necessary to send the case back to the trial court for further hearings to ascertain the amount of recoverable damages.

V. The Court of Appeals Did Not Make the "Holding" as to the June 5, 1959 Letter Asserted by Zenith.

In an attempt to create the semblance of an issue where one does not in fact exist, Zenith has asserted that the Court of Appeals "apparently" held (Z. Pet. Cert. 17, 20) that on remand Zenith's damages must be limited to damages flowing from the June 5, 1959 letter. Thus having propounded this alleged issue as Question 6 (Z. Pet. Cert. 3), Zenith argues in Section II that the Court of Appeals limited Zenith's "Damage Proofs to Damages Flowing From the June 5, 1959 Letter" (Z. Pet. Cert. heading and text pp. 15-17) and then proceeds to reiterate this same contention in Section IV (Z. Pet. Cert. 20-21).

This argument appeared in Zenith's earlier petition (Z. Pet. Mand. 5, 17-18, 20) and was answered briefly (HRI

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and rejected by this Court, whereas in fact HRI's counsel was pointing out (HRI Br. Opp. Mand. 31-32) that the issue of release and limitations involved a "ruling of law" and obviously the question of necessity for further hearings could not be determined until the Court of Appeals had passed on those legal questions.

Br. Opp. Mand. 26 n. 14), but since Zenith now has seen fit to make it a substantial part of both Sections II and IV of its current petition we will deal with it here in somewhat greater detail.

There is no basis for this attempted rewriting of the Court of Appeals' second opinion. Nowhere did the Court of Appeals hold that Zenith's recovery was limited to damages flowing from the June 5, 1959 letter. Rather, the Court of Appeals held that recovery of damages resulting from pre-release conduct was barred by the releases (Slip Opinion 4, 6-7), that recovery of damages flowing from pre-damage period conduct was barred by the statute of limitations (Slip Opinion 4-5, 6-7), but that Zenith could recover damages resulting from conduct which took place within the damage period (Slip Opinion 5, 7).

Having decided that recovery was limited to the damages caused by conduct which took place during the damage period, the Court of Appeals pointed to the June 5, 1959 letter wherein the Canadian pool wrote to Zenith charging infringement, obviously as an illustration of conduct during the four-year period for which it could claim the right to recover damages (Slip Opinion 5).

Nowhere in the opinion is there any holding that Zenith's recovery is *limited* to damages resulting from that letter. On the contrary, the Court of Appeals held that Zenith was entitled to recover all damages suffered during the damage period resulting from conduct which took place during the damage period.

VI. The Question of Tolling of the Statute of Limitations Is Not Before This Court and Is Not Involved on This Record.

By its Questions 4 and 9 (Z. Pet. Cert. 2, 4), its Statement (p. 7), and Section III of its petition (pp. 18-20),

Zenith asserts that the question is presented whether the four-year statute of limitations was tolled during the pendency of *United States* v. *General Electric, et al.* (Civil Action No. 140-157, S.D. N.Y.), in which Hazeltine Corporation (not Hazeltine Research, Inc.) was named as co-conspirator but not joined as a defendant.

Zenith made this same argument in its petition for mandamus, although it did not seek to dignify it by a separate section (Z. Pet. Mand. 19-20; see HRI Br. Opp. Mand. 33-35).

The question whether pendency of government litigation tolls the statute of limitations as against a party in a civil suit who is not a defendant in the government litigation, was not before the Court of Appeals, since Zenith never pleaded or asserted tolling in the trial court. Indeed, Zenith's actions in the trial court affirmatively show that Zenith never intended to and could not rely on tolling.

The Court of Appeals in a footnote to its opinion (Slip Opinion 5 n. 3) pointed out that the question of tolling was not before the court, but commented that under the most recent case in the circuit, tolling did not apply to a non-defendant in the government suit (HRI Br. Opp. Mand. 33-35). This was *dictum*, for not only is the issue of tolling not presented, but any claim of tolling is in *direct conflict* with the sworn representations and statements of Zenith's counsel which formed the basis of Zenith's counterclaim.

In our brief opposing Zenith's mandamus petition, we set forth briefly the background showing that the issue of tolling was not presented (HRI Br. Opp. Mand. 33-34). Since Zenith now devotes a separate section to the argument, we believe it appropriate to point out further what the circumstances were in relation to Zenith's counterclaim.

Zenith's answer to HRI's patent infringement complaint was filed on April 7, 1960 (A. 1, 14-19). It alleged in paragraphs 12 and 13, domestic patent practices and patent pools in Canada and elsewhere, as misuse and "unclean hands" defenses, but asserted no counterclaim (A. 14-19). Approximately three years later on May 22, 1963, Zenith was granted leave to file and filed its counterclaim alleging, among other things, injury to its Canadian business (A. 64-69).

To obtain leave to file this counterclaim three years after the answer, Zenith filed the sworn affidavit of Francis W. Crotty, a Zenith vice president, and patent counsel, and who was a counsel of record in this case. In the affidavit Crotty stated that *"the matters* alleged in paragraphs 6-9 of defendant's counterclaim, to which this affidavit is attached, and *which are the proximate cause of damages alleged* and require the relief sought in said counterclaim, *occurred after the filing of the answer herein"* (A. 63, para. 2). A similar representation was made in Zenith's motion for leave to file, where Zenith counsel represented that the counterclaim arose out of the matters set forth in defendant's answer, *"and current related unlawful activities* of plaintiff occurring since the filing of the answer *which activities are the proximate cause of* present and continuing *damage* to defendant sustained after the filing of the answer" (A. 62). Thus, although alleged matters occurring prior to the filing of the answer would relate to the identification of the alleged conspiracies and to the right to the injunctive relief prayed, Zenith obtained leave to file its claim for damages on the basis of the express representation that it was only claiming damages resulting from matters occurring *after* April 7, 1960, the date Zenith filed its answer.

Furthermore, Zenith's counterclaim did not allege the *United States* v. *General Electric* litigation nor assert toll-

ing, and, indeed, it could not have done so in light of the limitations on Zenith's damage claim asserted in its sworn affidavit and motion.

To subsequently assert that Zenith was entitled to rely on a tolling of the statute of limitations and thereby claim damages based on acts taking place as early as 1954, is a direct contradiction of Zenith's sworn representations, and if permitted would involve a major change in the scope of its counterclaim for damages.

The cases establish that tolling by reason of the pendency of government litigation should be affirmatively alleged as a part of the cause of action if it is to be relied on. See *Tague* v. *Balaban,* 1956 Trade Cas. ¶ 68,539 (N.D. Ill. 1956); *National & Transcontinental Trading Corp.* v. *International General Electric Co.,* 15 F.R.D. 379 (S.D.N.Y. 1954).[15]

Zenith's counsel well knew that tolling should be pleaded if it was to be relied upon. As we pointed out (HRI Br. Opp. Mand. 34), in the amended and supplemental counterclaim filed by Zenith in the RCA-Zenith litigation (PX 42, A. 2743-50), Zenith expressly set forth government litigation and alleged "tolling of the statute of limitations because of said Government suit" (A. 2746).[16]

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[15] The rule here is analogous to the requirement that "fraudulent concealment" be pleaded if it is to be relied on as tolling the statute of limitations. *Moviecolor Ltd.* v. *Eastman Kodak Co.,* 288 F.2d 80, 88 (2d Cir.), *cert. denied,* 368 U.S. 821 (1961); *Kansas City* v. *Federal Pacific Electric Co.,* 310 F.2d 271, 284 (8th Cir. 1962), *cert. denied,* 373 U.S. 914 (1963); *Swan* v. *Board of Higher Education,* 319 F.2d 56, 61 n. 9 (2d Cir. 1963); and *Picoult* v. *Ralston Purina Co.,* 1969 Trade Cas. ¶ 72,681 (S.D.N.Y. 1969).

[16] In the instant case, Zenith's claim of damages based on pre-damage period conduct appeared in the Findings of Fact, prepared by Zenith and adopted verbatim by the trial court, in which the

When Zenith not only failed to plead tolling but obtained leave to file its damage claim on a basis totally *inconsistent with* a claim of "tolling," the Court of Appeals could reach no other conclusion than the one that it did; namely, that the issue of tolling was not presented.

This situation is analogous to *Moviecolor Limited* v. *Eastman Kodak Company,* 288 F.2d 80 (2d Cir.), *cert. denied,* 368 U.S. 821 (1961) where the Second Circuit held that not only was tolling based on "fraudulent concealment" not pleaded, but that it could not be subsequently pleaded because "the complaint not only does not allege concealment but *substantially negates* it" (288 F.2d at 88). In this case nothing could more "substantially negate" a claim of tolling and the right to rely on pre-damage period conduct as a basis for an award of damages than Zenith's representation to the court in May 1963 that its claim for damages was based on "matters . . . which . . . occurred *after* the filing of the answer herein" [April 7, 1960] (A. 63).

Aside from its attempt to persuade this Court that the Court of Appeals somehow "ruled" improperly on tolling, Zenith makes a new contention. It asserts that "this Court in effect has ruled" that the statute of limitations if applicable "would not run during the pendency of the instant suit" and that the counterclaim would relate back to the filing of the instant suit, citing footnote 2, 395 U.S. at 108. This newly devised contention (it was not

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assertion of damages as to Canada based on alleged conduct going all the way back to the formation of the pool in 1926 was made (Findings XXV-XXX, XXXVI, A. 2903-06, 2908). It was subsequent to these findings that HRI's new counsel obtained leave to plead the defenses of release and limitations, which defenses were not relevant to the counterclaim as pleaded. Zenith at no time sought to assert tolling in the trial court, but first attempted to raise the issue on appeal.

made in Zenith's petition for mandamus) involves a clear misstatement of what this Court said.

In footnote 2 this Court pointed out that Zenith, HRI and the courts below all considered the damage period to be the four years prior to the date of filing of the counterclaim, *i.e.*, May 22, 1959 to May 22, 1963, and "No argument was made that the counterclaim, in whole or in part, related back to an earlier pleading, thereby expanding the damage period to include years prior to 1959" (395 U.S. at 108 n. 2). Such an argument, and the claim of damage based on pre-damage period conduct, would, of course, have been inconsistent with Zenith's representations which formed the basis of the grant of leave to file the counterclaim.

Finally, even if tolling had applied, Zenith's recovery would still be limited to damages resulting from conduct occurring after September 27, 1957 since all damages resulting from acts taking place during the period from 1926 (when the Canadian pool began) to September 27, 1957, the date of the releases, would be barred. And since Zenith claims that it should have had 16% of the Canadian market beginning May 22, 1959 if it had been allowed to develop the Canadian market during the period from 1926 to May 1959, it is obvious that a substantial portion of its claim would be barred, in any event, by the releases.

VII. Zenith's Assertion That It Should Be Granted Recovery of Damages Even If Barred by Release and Limitations Is Groundless.

This argument was answered at pages 32-33 of HRI's brief in opposition to Zenith's mandamus petition.

Zenith, under a new heading, Section IV (Z. Pet. Cert. 20-23), re-asserts the novel theory (Z. Pet. Mand. 23) to the effect that even though the defenses of release and limita-

tions do apply, this fact should be *ignored* and Zenith awarded the damages resulting from pre-release and pre-damage period conduct.

The purported basis for this theory is that because the *Story Parchment* and *Bigelow* cases have held that there may be liberality in proof of the amount of damages under some circumstances, particularly if the acts of the defendants have made more definite proof impossible, therefore that part of the damage award which is barred from recovery by release and limitations should nevertheless be included in the award. Thus, citing *Bigelow* as purported authority for its contention, Zenith asserts that it is an "irrelevant issue . . . whether or not evidence of damage flowing from pre-damage period acts was mixed into the damage award . . ." (Z. Pet. Cert. 22).[17]

In a word Zenith either asserts that these cases *nullify* the Statute of Limitations (15 U.S.C. § 15b), and the law as to settlement and release and their effect, or Zenith is proposing that the legal effect of these defenses should be *ignored*.

Contrary to what Zenith suggests, it will not be impossible to determine what damage flowed from damage period con-

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[17] Zenith also asserts that because the Court of Appeals commented that the type of evidence Zenith had offered was "competent evidence, prima facie" as a basis for determining damages and because the court made reference to the issue of "excessiveness of the award" (Slip Opinion 6), that the Court of Appeals had somehow acknowledged the propriety of the original award and yet was presuming to question it (Z. Pet. Cert. 21, 7). The fact is, of course, that when the Court of Appeals was referring to "prima facie" competency it was talking about the question of competency absent the interposition of the affirmative defenses, and the reference to "excessiveness of the award" was related to the fact that the award improperly included damages based on pre-damage period conduct.

duct as contrasted to damage resulting from pre-damage period conduct. The method to determine such damages will be to start with Zenith's actual market share at the beginning of the damage period and determine what additional market share Zenith would have achieved and what profits Zenith would have realized during the four-year period, but for the damage period conduct of the Canadian pool. Then subtracting Zenith's actual profits during the four-year period, the difference will constitute Zenith's damage.

It is quite apparent why Zenith asserts it should be entitled to be awarded damages even though barred by release and limitations. The likelihood is that the further hearings will disclose that the award to which Zenith is entitled is only a fraction of $18,892,173. In effect, Zenith is arguing that it is irrelevant if the award includes millions of dollars to which it is not legally entitled.

VIII. There Is No Basis for Zenith's Insinuation That It Is an Embattled Litigant Being Denied Justice by a Prejudiced Court of Appeals.

Zenith's current petition omits the outrageous innuendo of its petition for mandamus that "it is apparent from its two opinions that the court below is going to find successive reasons for denying Zenith the treble damage recovery in this case" (Z. Pet. Mand. 24), but continues its basic pose as an embattled litigant being denied justice by a prejudiced court. Thus, it again makes its charges against Judge Cummings, a member of the hearing panel (Z. Pet. Cert. 6-7), intersperses the brief with insinuations of prejudice by the appellate court (Z. Pet. Cert. 7, 15, 16,

17)[18] and again argues that because the litigation has been pending for a number of years, this is a reason why it ought to be brought to an end, in Zenith's favor (Z. Pet. Cert. 25).

We have already commented on the attacks upon Judge Cummings and upon the entire hearing panel (HRI Br. Opp. Mand. 35-39). In addition to the long delay in claiming disqualification of Judge Cummings (HRI Br. Opp. Mand. 35-37), Zenith's complete lack of good faith is illustrated by the facts as to the charges against Judge Cummings. After the original decision by the Court of Appeals, Zenith filed its petition for rehearing requesting "that the case may be reheard by the entire Court *en banc*" (A. 4265), thereby specifically requesting that the entire court (which included Judge Cummings) should participate. Zenith and its counsel then well knew all of the alleged facts which were supposed to have disqualified Judge Cummings, yet Zenith requested that he participate in a rehearing.

In considering Zenith's pose as a litigant being denied justice there are certain additional facts which may well be considered.

First, Zenith originally got the trial court to enter findings in January 1965 (which Zenith drafted) which, after trebling, would call for a treble damage judgment of almost $49 million (Finding XXXVI, A. 2908), of which about $30 million would have been as to England and

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[18] For example, at page 15, Zenith asserts that the Court of Appeals "limit[ed] the issues to be tried [on further hearings] in such a way as to in effect *destroy* the petitioner's right to recover treble damages in this case." This is sheer nonsense, for the Court of Appeals specifically held that Zenith could recover damages resulting from damage period conduct, and that is all it is entitled to.

Australia and almost $19 million as to Canada. Following only limited further hearings as to England and Australia in late 1965, the trial judge himself recognized in part that he had been misled and reduced his award as to those countries by nearly $14 million, down to approximately $16 million (Amended Finding XXXVI, A. 3537, 3539). On appeal the Court of Appeals held that Zenith in fact had suffered *no damage* in those countries (388 F.2d at 36-37), and this Court affirmed (395 U.S. at 114). If HRI had been denied the opportunity to pursue its remedies, Zenith would have been awarded almost $30 million based on alleged "damages" which it *said* it had suffered, and which in fact it had not.

Secondly, after Zenith got the trial court to enter the findings calling for treble damages of almost $49 million, it was apparent to Zenith that HRI could pay only a small portion of this amount, its net worth at the end of 1964 being only about $3,184,419 (A. 3007). Accordingly, Zenith for the first time asserted that the parent Hazeltine Corporation should be bound by the judgments and the trial court entered the judgments requested by Zenith. However, the Court of Appeals held that the judgments against Hazeltine Corporation were void for want of jurisdiction (388 F.2d at 30) and this Court affirmed (395 U.S. at 110). These proceedings *took time*, but this obviously was no reason to deny the right of Hazeltine Corporation to *expose the invalidity* of the judgments against it.

Now, as to Zenith's Canadian damage claim, Zenith again suggests that the *public interest* requires that Zenith be granted an award of $18,892,173 (Z. Pet. Cert. 17) and that the litigation must be brought to an end in Zenith's favor (Z. Pet. Cert. 25). Let us consider that contention.

This Court agreed that Zenith's damage claim as to England and Australia was not valid (395 U.S. at 114). As to

Canada, this Court concluded there was *some evidence* "although by no means conclusive," sufficient to support the "inference" that Zenith had been injured *"to some extent"* (395 U.S. at 114), but did not decide the question "how much" Zenith could recover. Rather, it remanded the case to the Court of Appeals so that it might consider the undecided issues relating to the affirmative defenses and the amount of recoverable damage in the light of those defenses which had not yet been ruled on by that court.

The Court of Appeals determined the question of release and limitations, as it had the power and duty to do, and since the trial court's original damage award was based in part on pre-release and pre-damage period conduct, it remanded the case to the district court so that the amount of damages to which Zenith was entitled could be determined. Yet Zenith suggests that as a matter of "grave public concern" (Z. Pet. Cert. 17) it should be awarded the entire amount of $18,892,173.

We submit that the acknowledged public policy involved in enforcing the treble damage remedy is no basis for the award of millions of dollars of damages to which a litigant is not legally entitled, particularly when the claimant is one like Zenith, who has already been demonstrated to have been ready to demand $30 million treble "damages" in England and Australia which it did not suffer. As we pointed out before (HRI Reply Br. Opp. Mand. 2-3), Zenith is not some small company fighting for its life but one of the giants of its industry asking to be awarded a sum, which is not only legally unjustified, but which would be totally destructive of HRI, since $18,892,173 is far in excess of its net worth.

We submit that the ends of justice require that these petitions of Zenith be denied so that the case may finally go back to the trial court for a determination of the amount which HRI in fact owes to Zenith.

CONCLUSION

We respectfully submit that Zenith's petition for a writ of certiorari should be denied.

Respectfully submitted,

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Dated: February 24, 1970

Appendix A to the Brief of Respondent Hazeltine Research, Inc.

In the
United States Court of Appeals
For the Seventh Circuit

SEPTEMBER TERM, 1969 — SEPTEMBER SESSION, 1969

Nos. 15246, 15563

HAZELTINE RESEARCH, INC.,
Plaintiff and Counter-Defendant, Appellant,

v.

ZENITH RADIO CORPORATION,
Defendant and Counter-Claimant, Appellee.

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.

OCTOBER 27, 1969

Before CASTLE, *Chief Judge,* KILEY and CUMMINGS, *Circuit Judges.*

KILEY, *Circuit Judge.* This court, on December 19, 1967, filed its decision, 388 F.2d 25 (7th Cir. 1967), in the above causes and, so far as pertinent now, affirmed the judgment awarding $150,000, treble damages, to Zenith Radio Corporation for misuse by Hazeltine Research, Inc. (HRI) of its domestic patents, but struck paragraph A of the related injunction, issued to restrain HRI from imposing unlawful conditions on those patents. We reversed the judgment in Zenith's favor for $38,000,000, treble damages, based on HRI's unlawful participation in the Canadian, English and Australian patent pools, and *ipso facto* set aside an injunction restraining HRI's further unlawful antitrust activity in these foreign patent pools.

On appeal to the Supreme Court, the treble damage award with respect to the domestic patents was not challenged. The Court, 395 U.S. 100 (1968), reversed our decision striking paragraph A of the injunction and remanded that part to this court for further consideration. The Court also reversed our decision setting aside the award of damages flowing from the unlawful activity of the Canadian pool and remanded that issue to us to consider the effect of HRI's affirmative release and statute of limitations defenses on the award. In addition, the Court reinstated the related injunction which this court had set aside with that treble damage judgment for Zenith.[1] The Supreme Court reversed our decision with respect to the Canadian patent pool because it concluded we erred in our determination that Zenith had failed to prove the "fact" of damage in Canada.

After the Supreme Court mandate was filed in this court, we gave leave to HRI and Zenith to file supplemental authorities. Zenith thereupon "abandon[ed] its request" originally made in this court to reinstate paragraph A which this court had struck. The following questions are before us: (1) whether Zenith's injury during the statutory damage period resulted to any extent from HRI's conduct preceding that period and, if so, what effect releases given by Zenith in 1957 had on Zenith's recovery; (2) what effect the statute of limitations had on HRI's liability; and (3) whether the award of damages was excessive. These points had been raised before us by HRI in the first appeal, but we saw no need of passing on them in view of our reversal of the judgment for Zenith.

We have examined the issues now before us in the light of the Supreme Court opinion and the supplemental authorities cited to us. We vacate the judgment for Zenith with respect to the Canadian pool in the amount of $6,297,391, trebled, and remand for further proceedings with respect to the award of damages.

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[1] The Supreme Court affirmed this court's decision vacating judgments in Zenith's favor against Hazeltine Corporation. It affirmed our decision with respect to setting aside the treble damage judgment so far as it was based on the patent pool activities in England and Australia.

THE AFFIRMATIVE DEFENSES

After the evidence at the trial was closed HRI moved for leave to file the affirmative defenses in bar of Zenith's recovery. Zenith's counsel objected to the filing of the defenses on the ground that they came too late and were waived. The district court, however, permitted the defenses to be filed and thereafter denied HRI's motion for judgment based on the defenses. The Supreme Court noted that the district court's refusal to disturb the findings it had already made with respect to the Canadian pool was a rejection of the defenses either on the merits or on the ground that the defenses had been waived under FED. R. CIV. P. 12(h). 395 U.S. 100, 117, n. 13. It is our view that the court's ruling was not on the basis of waiver, but because the defenses on their merits did not bar Zenith's recovery. We turn therefore to consideration of the correctness of the district court's ruling.

The relevant four year damage period was measured from May 22, 1963, when Zenith filed its counterclaim.[2] The cutoff date therefore was May 22, 1959. HRI relies upon releases given September 27, 1957, by Zenith to RCA, General Electric, and Western Electric in settlement of Zenith's counterclaim in the case of *RCA v. The Rauland Corp. and Zenith Radio Corp.*, No. 48 C 1818 (N.D. Ill. 1957), in contending that Zenith's claim is now barred.

The Supreme Court in noting that the district court did not date the events as occurring before or after the May 22, 1959 start of the damage period, said "[t]he damage award was confined to *injuries* sustained during the damage period, but the trial court apparently deemed it immaterial whether the damage-causing acts occurred before or after the start of the damage period." 395 U.S. 100, 116 (1968). Damages were awarded, the Court said, on the assumption that were it not for the conspiracy, Zenith would have had sixteen per cent of the Canadian market instead of its actual three per cent on May 22, 1959 and throughout the damage period. The Court then stated that

2 See 395 U.S. 100, 108 (1968). 15 U.S.C. § 15b reads:

> Any action to enforce any cause of action under sections 15 or 15a of this title shall be forever barred unless commenced within four years after the cause of action accrued.

since the district court attributed the deficient share on May 22, 1959 to the conduct of the pool, that conduct necessarily preceded the deficiency, and therefore pre-damage period conduct necessarily resulted in some part of the damages awarded.

Since HRI was an unnamed joint tortfeasor, as admitted by Zenith at trial, with its co-conspirators in the Canadian pool who were named in the *Rauland* case, and Zenith did not reserve its right against HRI, the releases given by Zenith clearly barred recovery from HRI of past, present and *future damages* flowing from any misconduct of HRI prior to the dates of the releases. *Twentieth Century-Fox Film Corp v. Winchester Drive-In Theatre,* 351 F.2d 925, 931 (9th Cir. 1965), *cert. denied,* 382 U.S. 1011 (1966); *Dura Electric Lamp Co. v. Westinghouse Electric Corp.,* 249 F.2d 5 (3d Cir. 1957). Our inquiry therefore is narrowed to the question of the effect of the statute of limitations on Zenith's right of recovery for post-release misconduct.

It is "well settled . . . that no civil action lies for a conspiracy unless there be an overt act that results in damage to the plaintiff." *Nalle v. Oyster,* 230 U.S. 165, 182 (1913). Consequently, in the case before us the mere existence of the conspiracy following the 1957 releases does not itself give rise to Zenith's cause of action. The law with respect to the statute of limitations in Sec. 15b of the Clayton Act is that the period commences to run from the last overt act of the conspiracy. *Crummer Co. v. DuPont,* 223 F.2d 238, 247-48 (5th Cir.), *cert. denied,* 350 U.S. 848 (1955); *Momand v. Universal Film Exchange,* 43 F. Supp. 996, 1007 (D. Mass. 1942), *aff'd* 172 F.2d 37, 47 (1948); *Steiner v. Twentieth Century-Fox Film Corp.,* 232 F.2d 190, 194 (9th Cir. 1956); *Century Hardware Corp. v. Powernail Co.,* 282 F. Supp. 223, 227 (E.D. Wis. 1968). In *Century Hardware,* the district court construed this court's decisions in *Emich Motor Co. v. General Motors Corp.,* 229 F.2d 714 (7th Cir. 1956), and *Baldwin v. Loew's, Inc.,* 312 F.2d 387 (7th Cir. 1963), as stating the law of this Circuit to be in accordance with the foregoing decisions.

In *Hanover Shoe, Inc. v. United Shoe Machinery Corp.,* 377 F.2d 776 (3d Cir. 1967) (supplemental opinion at 793-95), the following rule was applied:

> [W]here the repeated and measurable invasion of a plaintiff's rights occurs both outside the statutory period and also within it, the fact that some of the injury and damage occurred outside the statutory period does not affect the plaintiff's right to recover for the separate invasion of its rights which occurred within the period.

The rule as applied in that case was approved by the Supreme Court on appeal of the *Hanover* case. See 392 U.S. 481, 502 n. 15 (1968). Thus, even though Zenith may have had a cause of action for overt acts of the conspiracy prior to May 22, 1959—the beginning of the damage period—the fact that it did not then file suit does not preclude its present suit for damages suffered within the damage period as a result of an overt act repetitious of the unlawful pre-period acts occurring in the damage period.

HRI conceded at trial that the Canadian pools existed into the damage period. The record establishes that on June 5, 1959, the Canadian pool wrote Zenith claiming that it was infringing pool patents by its distribution of American-made televisions and radios in Canada. This act was substantially similar to overt acts occurring in the pre-damage period. Accordingly, Zenith, claiming the right to recover for damages suffered only in the statutory period, is entitled to recover for the damages it suffered as a result of the June 5 injury.[3]

We conclude therefore that the district court's denial of the motion to bar Zenith's recovery completely on the ground of the releases and the running of the statute of limitations was not erroneous.

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[3] Zenith argued in its original brief that the statute of limitations was tolled by reason of Sec. 5(b) of the Clayton Act during the pendency of *United States v. General Electric, et al.* in the Southern District of New York from November 28, 1958 to November 1, 1963. At the trial Zenith did not raise this point in a reply to HRI's affirmative defense, so that, strictly speaking, the point is not properly before us. However, in any event, the law of this circuit is that the tolling of the limitation protects a plaintiff in a private antitrust suit only with respect to a party defendant in the government suit. *Sun Theatre Corp. v. RKO Radio Pictures*, 213 F.2d 284, 292 (7th Cir. 1954). HRI was not a party defendant in that suit, although named as co-conspirator.

EXCESSIVENESS OF THE AWARD

We think this issue is not now ripe for decision because HRI had no opportunity, after the district court permitted filing of HRI's affirmative defenses, to introduce evidence relevant to the affirmative defenses. We vacate the district court's award of $6,297,371—trebled to $18,892,173—and remand for further proceedings.

The measure of proof is the difference between the percentage share that Zenith actually enjoyed during the damage period and the percentage it would have had as a free competitor. There was testimony for Zenith, relied on by the district court, that in the four year damage period, had Zenith been free from the unlawful activity of the Canadian pool which virtually excluded it from the Canadian market, it would have enjoyed the same proportion of that market as it did in the United States market. In Canada its principal competitors were counterparts of its principal competitors in the United States. Its promotion and advertising flowed back and forth between the two countries. Distributors in Canada were available, but were frightened off by the pool's activities and threats. It is our view that this was competent evidence, prima facie, upon which the amount of damage could be reasonably approximated, by virtue of the Supreme Court's decision in *Bigelow v. RKO Radio Pictures*, 327 U.S. 251, 264-65 (1946).

The district court in permitting the filing of HRI's affirmative defenses of release and statute of limitations—as an amendment to HRI's defense to Zenith's counterclaim—made it plain in doing so that the court would make no change in its findings and conclusions with respect to damage in the Canadian market. However, we refer again to the statement of the Supreme Court that "[s]ome part of the damages awarded . . . necessarily resulted from pre-damage period conduct." 395 U.S. 100, 116-17. The Court noted that although the damage award was confined to the damage period, the trial court apparently deemed it immaterial whether the "damage-causing" acts occurred before or after the start of the damage period.

Earlier in this opinion we held that the releases only barred Zenith's recovery of damages caused by injuries

inflicted prior to the date of the releases; that the damage period commenced to run from the last overt act of the conspiracy; and that the statute of limitations did not bar recovery of damages caused by "damage-causing" acts within the period. Accordingly, we think that HRI should have—what it was not given at the trial—an opportunity to introduce testimony, in support of its defense of statute of limitations, aimed at excluding from recovery damages flowing from pre-period "damage-causing" acts, as well as an opportunity to introduce evidence to show that Zenith's damage flowing from "damage-causing" acts within the period did not amount to $6,297,391.

The judgment for $6,297,391—before trebling—is vacated and the cause is remanded for further proceedings consistent with the views expressed in this opinion.

A true Copy:

Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969.

No. ~~4447~~ 80

ZENITH RADIO CORPORATION, A CORPORATION,
Petitioner,

vs.

HAZELTINE RESEARCH, INC., A CORPORATION,
Respondent.

REPLY BRIEF OF PETITIONER ZENITH RADIO CORPORATION.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969.

No. 1117

ZENITH RADIO CORPORATION, A CORPORATION,
Petitioner,

vs.

HAZELTINE RESEARCH, INC., A CORPORATION,
Respondent.

REPLY BRIEF OF PETITIONER ZENITH RADIO CORPORATION.

I.

CONTRARY TO THE COURT OF APPEALS' HOLDING AND HRI'S ASSERTIONS, THE RECORD SHOWS THAT THE DISTRICT COURT REJECTED THE ALLEGED DEFENSES OF RELEASE AND LIMITATIONS ON WAIVER GROUNDS.

At page 21 of its Brief in Opposition HRI asserts "[I]f the trial court had considered the defenses waived it would not have granted leave to file them over Zenith's objection." On the contrary, the District Court clearly held that HRI had shown no adequate grounds which would excuse the late pleading of these affirmative defenses and that he was only permitting them to be filed to preserve HRI's appeal record. This conclusively appears from the following chronology of events in the trial court:

(1) The motion to file the affirmative defenses of release and limitations was presented one year after the close of the proofs in the case, after proposed findings and post-trial briefs had been filed with the Court and after the District Court had announced its decision and entered its initial findings of fact and conclusions of law, but before entry of judgment (395 U. S. at 117, n. 13).

(2) The *only* ground claimed then or since for permitting these defenses to be raised out of time was that Zenith had allegedly changed its damage theory to the surprise and prejudice of HRI and that the defenses would have been pleaded had Zenith's theory of recovery been fairly disclosed (A. 2943). HRI counsel expressly disclaimed that he was seeking to amend and reopen the proofs on the basis of newly discovered evidence (Court of Appeals Appendix, A. 1947).

(3) The District Court rejected HRI's change of theory argument as sham, pointing out that the pleading allegations and pre-trial briefs made Zenith's theory plain to anyone able to "understand the English language" (Court of Appeals Appendix, A. 1865, 1878, 1934, 1949-50). The Court, in colloquy with HRI counsel stated: "You do agree that the statute of limitations can be waived? You agree to that, don't you?" (Court of Appeals Appendix, A. 2026).

(4) The District Court did, however, grant HRI's oral motion for leave to file the defenses of release and limitations "for the sake of the record" (A. 3036). In answer to Zenith's objection that the defenses were not timely filed and therefore waived, the District Court clearly indicated that the defenses would not be given retroactive effect and that he was only permitting the defenses to be filed so that HRI could protect its record on appeal. Thus he stated, "The record will show that leave is given to file them *at this time* [April 1, 1965], *after proofs have been*

closed and after findings have been made'' (A. 3037, 3038). The Court then proceeded to deny HRI's motion to withdraw the findings and reopen the proofs as to Canada (A. 3038, 3040, 3062). The Court said: "In regard to Canada, there will be no change [in the findings] as far as the Court is concerned" (A. 3037, 3038). Inasmuch as the motion to withdraw the findings as to Canada was based on the same spurious grounds assigned to excuse the late pleading of the affirmative defenses—namely, that Zenith had changed its theory of action—the denial of the motion necessarily was a rejection of these grounds and a holding that the defenses were belatedly raised and therefore waived.

Accordingly, before the Court of Appeals could treat the defenses of release and limitations as "in the case", it had to first hold that Zenith had in fact changed its theory of action and that the District Court abused its discretion in refusing to allow these defenses to be raised out of time. The court below avoids this determination by holding without record support that the District Court rejected them on their merits and not on waiver grounds, and that therefore the holding of the District Court could not be supported on the ground of waiver. This holding is directly contrary to the well established rule that the decision of the District Court can be affirmed on any ground shown in the record. See *Helvering* v. *Gowran*, 302 U. S. 238, 245 (1938).

II.

SINCE THE ONLY DAMAGES CLAIMED AND ALLEGED WERE FOR THE FOUR-YEAR STATUTORY PERIOD, THE DEFENSE OF LIMITATIONS IS IRRELEVANT IN ANY EVENT.

At page 27 of its brief, HRI quotes this Court's opinion that "some part of the damages awarded therefore necessarily resulted from pre-damage period conduct" because

Zenith claimed and recovered damages on the theory that it would have had a larger percentage of the market than it actually had at the start of the damage period. Therefore HRI argues (and the Court of Appeals has held on remand) a portion of the recovery is barred by limitations. This is a non sequitur. As this Court pointed out, "Zenith itself had requested damages only for the four-year period prior to the filing of its counterclaim and the findings of the District Court expressly limited the damages awarded to those occurring 'during the 4-year statutory damage period.' " (395 U. S. at 117, n. 13). The statute of limitations only bars recovery of damages occurring before the four-year statutory cut-off date. It is immaterial whether the damages *incurred during* the four-year period are in part the result of past illegal conduct or the cumulative effects thereof. See *Hanover Shoe, Inc.* v. *United States Machinery Corp.*, 392 U. S. 481, 501, n. 15.

III.

THE DISTRICT COURT SPECIFICALLY FOUND THAT BUT FOR CONTINUATION OF THE ILLEGAL POOL ACTIVITY DURING THE DAMAGE PERIOD, ZENITH WOULD HAVE HAD THE MARKET PERCENTAGE CLAIMED, AND THIS COURT EXPRESSLY APPROVED THAT FINDING AND THE DAMAGE MEASURE EMPLOYED.

At page 31 of its brief, HRI states "*there were no findings* as to amount of damages based solely on damage period conduct, and the necessity for further hearings in the light of the affirmative defenses is clear." As we have pointed out, Zenith was not required to compartmentalize or segregate its damages as between those resulting from pre-damage period conduct and damage period conduct *where the damages claimed occurred and their impact was felt during the statutory damage period, and recovery was limited to the statutory period.* The only necessary finding

was that Zenith was damaged in the amount claimed during the damage period. Both Wright and Kaplan testified that Zenith would have had the same share of the Canadian market as it enjoyed in the comparable United States market during the same statutory damage period but for the repressive effects of the pool. This Court credited that testimony (as indeed did the Court of Appeals) and expressly approved the damage measure employed. Accordingly, there is no need for further hearings and findings as to the damage amount and the Court of Appeals remand order is clearly inconsistent with this Court's opinion and mandate.

IV.

IN ALL EVENTS ZENITH DID NOT WAIVE THE BENEFITS OF TOLLING AND THE COURT OF APPEALS HOLDING ON THIS ISSUE CAN ONLY BE SUSTAINED ON THE FURTHER GROUND THAT TOLLING ONLY APPLIES TO A PARTY DEFENDANT IN THE GOVERNMENT SUIT WHICH HOLDING CONFLICTS WITH THE DECISIONS OF THIS COURT.

The Court of Appeals held not only that HRI was entitled to the claimed damage reducing benefits of the "belatedly raised" limitations defense, but also that Zenith could not assert that the statute of limitations was tolled by the pendency of *United States* v. *General Electric, et al.* The effect of tolling would be to extend the permissible recovery period back to November, 1954. The court below based this holding on the dual grounds that (1) the issue of tolling was not before the court because Zenith did not plead tolling, and (2) that in any event under its earlier *Sun Theatre* decision (213 F. 2d 284, 292) tolling did not apply to a named co-conspirator, such as Hazeltine, but only applied to a party defendant in the government suit. HRI tacitly concedes the conflict and error in this holding,

but urges that it was *dictum* on the ground that Zenith did not raise tolling at the trial and that therefore the issue of tolling was not before the Court of Appeals (Brief in Opposition, p. 34). Obviously there was no reason for Zenith to plead tolling in the trial court, since its counterclaim only sought damages for, and recovery was limited to, the four-year statutory period, and since there was no issue raised as to limitations until *after* trial of the counterclaim. Only if the Court of Appeals subsequently held limitations to be in the case and a bar to recovery of damages incurred during the damage period but resulting from pre-damage period conduct—as it has now held—would tolling be relevant. Zenith pointed this out in its brief when the case was first before the Court of Appeals.

Moreover, under notice pleading requirements Zenith did not have to plead tolling in order to claim the benefits thereof. The statute of limitations is an affirmative defense and Zenith was under no duty to anticipate this defense and by way of avoidance allege that the statute was tolled during the pendency of the government suit. See *Hughes* v. *Roosevelt*, 107 F. 2d 901, 902; *Carroll* v. *Pittsburgh Steel Co.*, 103 F. Supp. 788, 789; *Alden-Rochelle, Inc.* v. *ASCAP*, 3 F. R. D. 157, 159. Nor was Zenith required to file a "reply" to the defense of limitations even if timely filed. See FRCP Rule 7. Section 5(b) of the Clayton Act expressly provides that the statute is tolled during the pendency of the government proceeding and this Court has held that a plaintiff is entitled to the benefits thereof upon showing that his action is based "in part on matters complained of in the government suit." *Leh* v. *General Petroleum Corp.*, 382 U. S. 54. Indeed, in *Leh*, tolling was not pleaded in the complaint and was raised for the first time after defendants had moved for summary judgment on the ground the action was barred by limitations.

CONCLUSION.

For the foregoing reasons, we respectfully urge that the Petition for Writ of Certiorari be granted.

Respectfully submitted,

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FILED
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969.

No. ~~1447~~ 80

ZENITH RADIO CORPORATION, A CORPORATION,
Petitioner,

vs.

HAZELTINE RESEARCH, INC., A CORPORATION,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

MOTION TO ADVANCE ORAL ARGUMENT.

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THE GUNTHORP-WARREN PRINTING COMPANY, CHICAGO

IN THE

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OCTOBER TERM, 1969.

No. 1117

ZENITH RADIO CORPORATION, A CORPORATION,
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vs.

HAZELTINE RESEARCH, INC., A CORPORATION,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

MOTION TO ADVANCE ORAL ARGUMENT.

Petitioner Zenith Radio Corporation, through its counsel, respectfully moves the Court for an order advancing the oral argument in the above entitled cause so that it may be heard during the 1969 Term. The petition for writ of certiorari was granted on March 16, 1970. Petitioner is advised that in all cases in which certiorari was granted subsequent to February 24, 1970, the cause is automatically placed on the calendar for oral argument next term unless otherwise ordered by the Court. As grounds for this motion petitioner states:

1. This cause is pending on certiorari the second time as a result of the October 27, 1969 decision rendered by the

Court of Appeals for the Seventh Circuit, following remand by this Court. When last reviewed, the Court of Appeals had reversed the $19,042,173 treble damage judgment against respondent Hazeltine Research, Inc. on the ground that petitioner had failed to prove that it had been damaged in its business by reason of the CRPL patent pool (388 F. 2d 25). This Court found that determination to be clearly in error and reversed the decision below. It remanded the case on related misuse and injunctive relief issues for further proceedings consistent with its opinion (395 U. S. 100). Despite this determination, the Court of Appeals has again set aside the judgment against respondent and has remanded the case to the District Court for a new trial of the Canadian damage issues. In our view, the decision of the court below is clearly contrary to the opinion and mandate of this Court.

2. Petitioner believes that the instant case can be fully and adequately briefed this term. The Court has previously ordered that the record on prior review in No. 49, October Term, 1968 stand as part of the record in this cause, and the Clerk advises that the previously printed nine volume appendix is available for use on this review. The Court is already familiar with the prior record and the further issues presented by the Court of Appeals recent decision following remand are relatively narrow in scope as indicated by the order placing this cause on the summary calendar. The parties have agreed upon the additional record to be printed and no delay in printing is anticipated. Petitioner intends to file the additional printed appendix covering proceedings following remand together with its brief on the merits no later than April 15, 1970. On this schedule respondent's answering brief would be due no later than May 15th, thereby permitting oral argument prior to the end of the term.

3. In its prior opinion this Court recognized the deterrent effect of a treble damage award against combinations designed to exclude an American firm from a foreign market. Such deterrent effect in the Canadian market has been greatly impaired by the last opinion of the Court of Appeals which has in effect reversed the opinion of this Court. Until the Court of Appeals decision is set aside and the Canadian judgment reinstated this litigation will have little effect on HRI's co-conspirators in Canada and Zenith's position in the Canadian market will remain uncertain and its business subject to grave risks. This litigation has been pending for almost eleven years and we most respectfully suggest that it is in the interest of justice and equity that it be concluded at the earliest date commensurate with the other duties and obligations of this Honorable Court.

WHEREFORE, petitioner prays that the Court order that the oral argument in this cause be advanced to a convenient session of arguments scheduled prior to the end of the term.

Respectfully submitted,

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Office Supreme Court, U.S.
FILED
APR 13 1970
JOHN F. DAVIS, CLERK

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BRIEF FOR PETITIONER ZENITH RADIO CORPORATION.

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IN THE

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BRIEF FOR PETITIONER ZENITH RADIO CORPORATION.

CITATIONS AND OPINIONS BELOW.

The first opinion of the Court of Appeals (A. 4238)* is reported in 388 F. 2d 25. The second opinion of the Court of Appeals (AA. 54) is reported as *Hazeltine Research, Inc.* v. *Zenith Radio Corporation,* at 418 F. 2d 21. The opinion of this Court (AA. 4) is reported in 395 U. S. 100.

* The printed appendix in No. 49, October Term, 1968 is referred to with the letter prefix A. The additional printed appendix herein, covering proceedings following remand and certain trial court proceedings not previously printed, is referred to with the prefix AA.

JURISDICTION.

The judgment of the Court of Appeals was entered on October 27, 1969 and its mandate stayed on November 6, 1969 (AA. 62). The petition for certiorari was filed on January 26, 1970 and was granted by this Court on March 16, 1970. The jurisdiction of this Court rests on 28 U. S. C. 1254 (1).

STATUTES INVOLVED.

The statute and rule provisions involved are:

Section 1 of the Sherman Act, 15 U. S. C. § 1, providing in pertinent part:

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. . . ."

Section 4 of the Clayton Act, 15 U. S. C., § 15, providing:

> "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found, or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained and the cost of suit, including a reasonable attorney's fee."

Section 5(b) of the Clayton Act, 15 U. S. C. § 16(b), viding in pertinent part:

> "Any action to enforce any cause of action under sections 15 or 15a of this title shall be forever barred unless commenced within four years after the cause of action accrued. . . ."

Section 5(b) of the Clayton Act (15 U. S. C. § 16(b)); providing in pertinent part:

> "Whenever any civil or criminal proceeding is in-

stituted by the United States to prevent, restrain, or punish violations of any of the antitrust laws, but not including an action under section 15a of this title, the running of the statute of limitations in respect of every private right of action arising under said laws and based in whole or in part on any matter complained of in said proceeding shall be suspended during the pendency thereof and for one year thereafter: . . ."

Rule 52(a) of the Federal Rules of Civil Procedure providing in pertinent part:

". . . Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. . . ."

Rule 12(h) of the Federal Rules of Civil Procedure as amended Jan. 21, 1963, effective July 1, 1963 and in force at the time pertinent to this cause, providing in pertinent part:

"A party waives all defenses and objections which he does not present either by motion as hereinbefore provided, or if he has made no motion, in his answer or reply, . . ."

Rule 8 (c) of the Federal Rules of Civil Procedure providing in pertinent part:

"In pleading to a preceding pleading, a party shall set forth affirmatively . . . release . . . and any other matter constituting an avoidance or affirmative defense. . . ."

Rule 7 of the Federal Rules of Civil Procedure providing in pertinent part:

"There shall be a complaint and an answer; a reply to a counterclaim denominated as such; . . . No other pleading shall be allowed, . . ."

QUESTIONS PRESENTED FOR REVIEW.

1. Whether the court below had jurisdiction under this Court's mandate which was limited to "further proceedings consistent with this opinion" to construe such mandate as remanding the issue of damages to the Court of Appeals "to consider the effect of HRI's affirmative release and statute of limitations defenses on the award"?

2. Whether the court below, by failing to accept the reasonable inferences and conclusions of the trial court drawn from the undenied testimony and documents, usurped the functions of the trial court as the trier of facts contrary to Rule 52(a) of the Federal Rules of Civil Procedure?

3. Whether the court below had jurisdiction under this Court's mandate to vacate the District Court's findings and award of $6,297,391 before trebling and to grant a new trial of the damage award?

4. Whether the court below in attempting to limit petitioner's recovery on a new trial to the damage period starting June 5, 1959 and limiting petitioner's damages to those flowing from the June 5, 1959 injury was in conflict with the decisions of this Court on treble damage recovery in this and other cases?

5. Whether the court below had jurisdiction or was in conflict with the decision of this Court in the instant case in determining that illegal acts prior to the damage period can be used to reduce petitioner's damage award in the face of this Court's holding that "the record evidence is sufficient to support the finding of damage resulting from events occurring after the beginning of the damage period"?

6. Whether the court below had jurisdiction to grant a new trial to determine whether injury occasioned by acts prior to the damage period could be utilized to reduce

petitioner's damage award in the face of this Court's opinion that "It is enough that the illegality is shown to be a material cause of the injury; the plaintiff need not exhaust all possible alternative sources of injury in fulfilling its burden of proving injury under § 4"?

7. Whether the court below was in conflict with the decisions of this Court in this and other cases in reserving for future determination the question of whether the treble damage award which is based on proofs held legally sufficient by this Court is or is not excessive?

8. Whether the statute of limitations under § 5(b) of the Clayton Act was tolled during the pendency of *United States* v. *General Electric, et al.* (Civil Action No. 140-157, S. D. N. Y.) filed by the government on November 24, 1958 in the Southern District of New York, in which government proceedings Hazeltine was named as a co-conspirator in the same conspiracy asserted in the instant case?

9. Whether the release given Hazeltine's co-conspirators three years before the damage period involved here had begun can be utilized as barring or reducing recovery in any action under the antitrust laws for damages accruing during the damage period?

10. Whether the statute of limitations can be asserted where the damages caused the petitioner were limited by the trial court to those occasioned by an illegal conspiracy during a time not barred by the statute of limitations?

11. Whether the court below in determining that the affirmative defenses of release and statute of limitations had not been waived under Rule 12(h) of the Federal Rules of Civil Procedure and that the trial court did not hold them waived pursuant to said Rule was in conflict with the decision of this Court in the instant case?

12. Whether the court below rendered a decision in

conflict with the decision of this Court in the instant case in holding that HRI's release and statute of limitations defenses asserted more than a year after the trial of this case justify vacating the damage award and judgment of the District Court in the amount of $6,297,391 before trebling entered on April 5, 1965?

STATEMENT OF THE CASE.

In November, 1959 Hazeltine Research, Inc. (HRI), an Illinois corporation which owns and licenses domestic patents principally in the radio and television field, brought suit in the Northern District of Illinois, claiming that Zenith television sets infringed HRI's patents. The trial court held this suit was instituted by HRI as a part of a conspiracy to bar Zenith television and radio sets from the Canadian market (A. 11, 2857, 2905-6).

On May 22, 1963 Zenith filed a counterclaim against HRI for treble damages and injunctive relief, setting up violations of the Sherman Act resulting from misuse of HRI patents, including the one in suit, by virtue of the conspiracy between HRI, Hazeltine and the patent pool in Canada. Zenith proved that the Canadian patent pool known as Canadian Radio Patents Ltd. had refused to license patents placed within their exclusive licensing authority, including Hazeltine patents, to Zenith and others seeking to export American made radios and television sets into Canada. See Findings XXV through XXXII (A. 2903-2906).

The District Court, sitting without a jury, ruled for Zenith in the infringement action. On the counterclaim, HRI and Hazeltine, the parent company, were found to have conspired with foreign patent pools which had excluded Zenith from the Canadian, English and Australian electronics markets. See Findings XV through XXIV (A.

2899-2903) and Findings XXXIII through XXXV (A. 2906-2907). The District Court held Zenith entitled to an injunction and to $35,000,000 in treble damages. The Court of Appeals below reversed the judgment on the ground that no fact of damage had been proven. 388 F. 2d 25 (7th Cir., 1968).

This Court granted certiorari (391 U. S. 933) to consider, among other things, whether the Court of Appeals properly discharged its function under Rule 52(a) of the Federal Rules of Civil Procedure which specifies that the findings of fact made a district court sitting without a jury are not to be set aside unless "clearly erroneous."

This Court affirmed the court below so far as the treble damage award involved the English and Australian patent pools. But so far as the Canadian pool was concerned it held the court below "was clearly in error." This Court said (AA. 18):

> "This evidence clearly warrants the inference that CRPL's past conduct interfered with and made more difficult the distribution of Zenith's products in 1959 and later years. The District Court could reasonably conclude that the cumulative effects of the pool's campaign against imported goods had consequences lasting well into the damage period. It could also rationally be found from the evidence that Zenith, beginning in 1958, could not have reached its maximum potential by May 22, 1959, that the pool had effectively prevented an earlier beginning, and that Zenith therefore suffered damage during the damage period from having a smaller share of the market than it would have had if the pool had never existed."

How much that share was lessened was demonstrated by proof that Zenith, in the comparable American market, and against substantially the same competition, had during the damage period 16% to 20% of the American market while in the Canadian market, and against the pool,

Zenith could only obtain 3% during the same period (Def. Ex. 220, A. 2661).

Both Joseph S. Wright, petitioner's president, and Sam Kaplan, petitioner's treasurer, testified without objection or denial (A. 457) that without the interference by the Canadian pool Zenith would have obtained as large a share of the Canadian market as it obtained in the United States during the damage period.

Sam Kaplan, the chief financial officer of Zenith, testified without denial (A. 527-8) that free of the pool's restrictions "that we could accomplish in Canada the same percentage of industry we were able to accomplish in the United States. Now this takes into consideration the similarities between the countries, the effect of our advertising which overlaps and spills back and forth between the countries and the nature of our competition."

Kaplan was examined on the foundation proof of Zenith's books and records used in the damage computation as follows (A. 524):

> "Q. Can you tell us whether or not those books were kept in the regular course of business or whether or not they are correctly kept?
>
> Mr. Dodds (HRI counsel): Your Honor, I stipulate that they are kept in the regular course of business and are correct. No question about it.
>
> The Court: All right. That solves that."

The computation of the amount of Zenith's damages in Canada was prepared by Willis Stevenson, a certified public accountant and a member of the American Institute of Accountants, and the manager of Internal Auditing at Zenith (A. 495-6).

The witness testified as to the source of his figures, as to the different product lines of Zenith—television, radio, hi-fi, stereo and color television (A. 501-2). He testified

how he had tabulated it by five periods, starting June 1, 1959 and ending May 31, 1963, and the witness produced his worksheets showing his computations (A. 502, Def. Ex. 218; A. 2641). The figures in Canada were transcribed from government sources in Ottawa, Canada (A. 505) and the whole computation was put together as Def. Ex. 220 (A. 2661). *The exhibit was admitted in evidence without objection.*

In computing the lost sales in the Canadian market caused by the combination and conspiracy complained of, the witness said (A. 513-4):

> "In the Canadian market we have started with a base of the market, which I have previously described, for each of the five periods. We have applied the Zenith share of the domestic market expressed as a percentage for each of these five periods to arrive at a Zenith share of the Canadian market, expressed in units.
>
> "The Court: Assuming their share would be what, the same as it is in America or what?
>
> "The Witness: The same as it is in the United States."

The witness then said (A. 514):

> "From that number of units I have deducted the number of units we actually sold in the Canadian market in each of these five periods to arrive at the lost sales in the market, expressed in units. To these units I have applied a Zenith average factory selling price to Canada of sets, within these five periods, actual experience of our selling price to arrive at the lost sales in that market expressed in U.S. dollars at the factory selling price level . . . To the figure of lost sales in the market, I have applied the percentages of profit applying to additional volume of business and arrived at the lost profit on the lost sales, also expressed in U. S. dollars."

The witness said he followed that same method for each of the five periods (A. 514) and tabulated the computations in defendant's exhibit 220 (A. 513).

The witness testified from the schedule, his work sheets and on the basis of the formula described, and said:

> "In the Canadian market for the period June 1 to December 31, 1959, in television the lost profit was $708,028; in radio, $138,048 (A. 517). In 1960, with respect to television, the lost profit was $1,116,597, and for radio $145,371. [In] 1961 sir, the lost profit in television was $1,348,867; in radio $68,241. In 1962, the lost profit on television was $1,883,774, and on radio $75,622; for 1963, for the first five months, January through May, the lost profit in television was $769,630, and in radio, $43,213." (A. 518.)

Nowhere in this record is there any countervailing evidence to the above proof of the amount of petitioner's damage.

On the basis of this undenied evidence, the trial court found the amount of Zenith's Canadian damage to be $6,297,391 and on April 5, 1965 pursuant to Rule 54(b) of the Federal Rules of Civil Procedure awarded petitioner treble damages in the amount of $19,042,173 for loss of sales and profits in Canada by reason of the activity of the Canadian patent pool known as Canadian Radio Patents Limited (A. 3078).*

This Court in reviewing the damage proofs said (AA. 19):

> "We also conclude that the record evidence is sufficient to support a finding of damage resulting from events occurring after the beginning of the damage period * * * HRI frankly conceded the continuation of the pool before the District Court, and it appears sufficiently clear that throughout this time Zenith was deprived of what always had been refused it—a license on pool patents permitting it to sell American-made merchandise in Canada."

* This judgment also included $150,000 as damages for the misuse of HRI patents.

Continuing, the Court said (AA. 24):

> "Here, Zenith was denied a valuable license and submitted testimony that without the license it had encountered distribution difficulties which prevented its securing a share of the market comparable to that which it had enjoyed in the United States, and which its business proficiency, demonstrated in the United States, dictated it should have obtained in Canada. CRPL was an established organization with a long history of successfully excluding imported merchandise; and in view of its continued existence during the damage period, the injury alleged by Zenith was precisely the type of loss that the claimed violations of the antitrust laws would be likely to cause. The trial court was entitled to infer from this circumstantial evidence that the necessary causal relation between the pool's conduct and the claimed damage existed."

This Court then reversed the court below on the Canadian damage issue and remanded the case for further proceedings "consistent with this opinion" (AA. 40).

On remand to the Court of Appeals Zenith filed a motion asking that the Hon. Walter J. Cummings, Circuit Judge, recuse himself on the ground that said Judge had been the attorney for Western Electric Company, a subsidiary of American Telephone and Telegraph Co. in the case of *Zenith* v. *RCA, et al.*, involving the same antitrust violations by Canadian Radio Patents Limited, for the statutory period prior to October, 1957, at which time that case was settled. The record shows that said Walter J. Cummings executed the stipulation on behalf of Western Electric Co., which dismissed the case and was engaged for several years in defending Western Electric Company, a member of the pool, against the antitrust violations which were asserted by Zenith (AA. 49).

Zenith's motion for Judge Cummings to recuse himself was promptly denied (AA. 52) and in further proceedings

on remand, Zenith was forced to argue the issues before a judge who had appeared as its antagonist in the earlier case and opposed each and every contention made by Zenith, which contentions involved the same illegal conspiracy and its effect on Zenith's Canadian business prior to the 1957 settlement. On the remand, the court below undertook to hear *de novo* issues disposed of by this Court's opinion; proceeded to order a re-hearing in the trial court of the Canadian damage issue; vacated the April 5, 1965 damage judgment and then with no showing that the trial court had in any manner abused its discretion in refusing a new trial, proceeded to grant HRI the right to attempt to try the case all over again with evidence not shown to be "newly discovered" in order "to show that Zenith's damage flowing from 'damage causing acts' within the period had not amounted to $6,297,391" (AA. 61). No concurrent right was granted Zenith to show that the damages exceeded the allowed amount and by Footnote 3 of the opinion Zenith was denied the right to plead the tolling of the statute of limitations pursuant to Section 5(b) of the Clayton Act (AA. 59).

The court below vacated the trial court's judgment of damage on the ground that the statute of limitations which did not cover the four-year damage period nevertheless barred some part of the damage amount which might be found to be attributable to pre-damage period acts and which may have resulted in damage which did not occur until after the beginning of the four-year damage period.

The court below admits in its opinion that the evidence of loss of profits upon which the damage award was based was legally sufficient to make out a prima facie case. Since there was no countervailing evidence in the record it is quite apparent that the court below, contrary to the directions in this Court's opinion and contrary to the provisions

of Rule 52 (a) of the Federal Rules of Civil Procedure again substituted its own opinion for that of the trial court. This results in a complete negation of this Court's opinion and this Court's admonition that (AA. 23):

> "Trial and appellate courts alike must also observe the practical limits of the burden of proof which may be demanded of a treble-damage plaintiff who seeks recovery for injuries from a partial or total exclusion from a market; damage issues in these cases are rarely susceptible to the kind of concrete, detailed proof of injury which is available in other contexts. The Court has repeatedly held that in the absence of more precise proof, the factfinder may 'conclude as a matter of just and reasonable inference from the proof of defendants wrongful acts and their tendency to injure plaintiff's business, and from the evidence of the decline in prices, profits and values, not shown to be attributable to other causes, that defendants' wrongful acts had caused damage to the plaintiff.' "

Nowhere in this record is there any evidence that petitioners loss of profits during the damage period was occasioned by anything other than the illegal Canadian pool of which HRI was a member and which HRI admitted existed during the entire four-year damage period from June 1, 1959 to May 31, 1963.

SUMMARY OF ARGUMENT.

I.

THE EVIDENCE OF THE AMOUNT OF PETITIONER'S DAMAGE IN CANADA IS LEGALLY SUFFICIENT UNDER THE DECISIONS OF THIS COURT.

The decision of the court below that petitioner's damage must be computed as allocated to particular overt acts done pursuant to the conspiracy within the damage period is not legally tenable under this Court's decision in *Bigelow* and other treble damage cases.

Once the fact of damage has been proved, the trier of the facts can make a just and reasonable estimate of the damage based on relevant data and render its verdict accordingly. The court below concedes that the comparison between the free market in the United States and the restricted market in Canada is relevant data and concedes it to be *prima facie* evidence of the amount of petitioner's damage. Since there was no countervailing evidence this proof was conclusive in the instant case.

The argument that Zenith had to prove it had a mature market position at the beginning of the damage period is not tenable in the face of evidence showing that respondent and its co-conspirators had, by an illegal conspiracy, prevented petitioner from making such proof. Further, petitioner's damage exhibit which assumed petitioner had a mature market position at the beginning of the damage period was admitted without objection.

II.

THIS COURT DID NOT GRANT AUTHORITY TO THE COURT BELOW TO ORDER A NEW TRIAL ON THE CANADIAN DAMAGE ISSUE.

There was no showing that the trial court abused its discretion in refusing to grant a new hearing on the Canadian damage issue. And it was admitted that such motion was not based on newly discovered evidence. There was no showing that evidence sought to be offered at a new trial was either unavailable at the time of the original trial or could not have been then offered. Nowhere in this Court's opinion and mandate is there any authority granted the court below to grant a new trial and without such grant the court below had no authority to do so.

The claim that the case involves an erroneous ruling of law by the trial court is not supported by the record because neither the defense of the statute of limitations nor the defense of the 1957 release had any application to damages accruing in the period of June 1, 1959-May 31, 1963.

The court below gave no deference to the findings of the trial court or to the *Bigelow* case as a precedent. And its attempt to limit petitioner's damages to proof of an overt act within the damage period which damaged petitioner is untenable. The decision of the court below is in conflict with the statement of this Court that "the constant tendency of the courts is to find some way in which damages can be awarded where a wrong has been done."

III.

THERE IS NO MERIT IN THE "BELATEDLY RAISED" DEFENSES OF STATUTE OF LIMITATIONS AND RELEASE AND THEY WERE WAIVED.

A. The Statute of Limitations Is Not Applicable to Petitioner's Damage Claims.

The court below has adopted an untenable argument that the statute of limitations can be used to bar proof of overt acts outside the damage period even though the damage caused by these acts does not accrue until a time within the damage period.

Under the express terms of the statute of limitations it starts to run "after the cause of action accrued." The cause of action does not accrue until the damage is sustained. Therefore damages accruing during the damage period are not barred even though some part of the activity causing damage started or occurred prior to the damage period. It is therefore unnecessary to segregate the overt acts occurring before and within the damage period where the damage they caused "accrued" within the four years before suit was commenced.

Since the only damage sought or recovered in the instant case was the loss of profits accruing in the four-year damage period, there was no mistake of law on the part of the trial court in refusing to reopen the case to permit respondent to put irrelevant proof into the record and the entire defense of the statute of limitations was therefore irrelevant.

B. The Statute of Limitations Was Tolled in the Instant Case.

Under the decisions of this Court and the decisions of two Courts of Appeal the government antitrust case of *United States* v. *General Electric, et al.* (Civ. No. 140-157) in which Hazeltine was named a co-conspirator tolled the statute of limitations with respect to the instant case.

The contrary *Sun Theatre* decision of the court below was decided before Section 5 of the Clayton Act was amended by the Congress in 1955 and is in conflict with the decisions of this Court and of the Third and Eighth Circuits. Such conflict should be resolved by this Court so that the statute is tolled against named conspirators such as Hazeltine during the pendency of a government suit involving the same subject matter.

C. The RCA-Zenith 1957 Release Could Not Affect Zenith's Damage Claim From June 1, 1959 to May 31, 1963.

The release could not bar the cause of action which did not accrue prior to the damage period. To hold otherwise would be to construe the release as releasing future damages under the antitrust laws and therefore void as against public policy. As this Court said in its opinion, once Zenith demonstrated that its exports had been restained by the pool "the treble damage liability of the domestic participants in the conspiracy was beyond question." Here Zenith's exports were restrained by the pool during the entire damage period.

D. In Any Event the Affirmative Defenses of Statute of Limitations and Release Were Waived.

An affirmative defense which is not pleaded as required by Rule 8 (c) of the Federal Rules of Civil Procedure is waived under Rule 12 (h) of the same Rules. It cannot be revived by a motion for summary judgment in the manner attempted here. No showing was made that would justify the trial court in entertaining these defenses a year after the case was tried. The charge that Zenith had changed its damage theory and that therefore the delay was excused was properly rejected by the trial court as a sham.

ARGUMENT.

I.

UNDER THE DECISIONS OF THIS COURT IN THIS AND OTHER CASES, THE EVIDENCE OF THE AMOUNT OF PETITIONER'S DAMAGE IN CANADA IS LEGALLY SUFFICIENT TO SUPPORT THE DISTRICT COURT'S DAMAGE FINDINGS AND THE APRIL 5, 1965 JUDGMENT.

In its opinion in the instant case this Court said (AA. 30):

> "The purpose of giving private parties treble damages and injunctive remedies was not merely to provide private relief, but was to serve as well the high purposes of enforcing the antitrust laws."

This comment is particularly apt in the instant case because the combination which petitioner faces is world-wide in scope and respondent owns over 500 domestic and foreign patents licensed through patent pools to control the electronics markets of the world (Def. Ex. 1, A. 946).

In their answer to the petition in this case, respondent seeks to cast itself in the role of a small company harrassed and overborne by petitioner. However, respondent does not point out that it has been found to be in a conspiracy with the following companies with world-wide connections in the electronics business. These companies are: Australian Radio Technical Services and Patents Co.; Amalgamated Wireless Ltd.; Canadian Marconi Co.; Canadian Westinghouse, Ltd.; Northern Electric, Ltd.; Standard Radio, Ltd.; Canadian Radio Patents, Ltd.; Electrical and Musical Industries, Ltd.; General Electric Co., Ltd.; Marconi Wireless Telegraph Co., Ltd.; Philips Electric Co., Ltd.; Pye, Ltd.; Standard Telephone & Cables,

Ltd.; and the Gramophone Co., Ltd. The respondent has stipulated that these companies have aggregate assets of more than a billion dollars (A. 91-100).

Since these companies are not subject to the injunction entered only against HRI in this case, the deterrent effect of an enforced treble damage judgment is necessary to serve "the high purpose of the antitrust laws" in opening up foreign markets to American electronics companies. The relief granted Zenith in the instant case must of necessity redound to the benefit of other American companies seeking access to these foreign markets.

We submit further that in viewing respondent's activities in this case, it should be borne in mind that the trial court found that the respondent started the present suit pursuant to the Canadian conspiracy (A. 11, 2857) and that this suit, as respondent's counsel has admitted in open court, is part of an effort to enforce the patent restrictions against imports imposed by the Canadian pool (A. 131-2).

In its last opinion, just as it had in its first, the court below has ignored the principles set forth in this Court's opinion that "an appellate court, when reviewing the findings of a judge as well as those of a jury, is circumscribed by the deference it must give to decisions of the trier of the fact who is usually in a superior position to appraise and weigh the evidence" (AA. 22-23).

In its latest opinion, the court below in setting aside the trial court's findings on the amount of petitioner's damages has treated the case as if the amount of damage must be computed as allocated to particular overt acts done pursuant to the conspiracy within the damage period. The fact that this is a suit to recover lost profits over a particular period of time is completely ignored as well as the decisions of this Court dealing with that issue when the "fact of damage" has been proved.

Here this Court has held that the fact of damage is abundantly proved and that "the Court of Appeals is clearly in error" in holding that it was not.

This Court, in dealing with the first opinion of the court below said (AA. 22):

> "In this respect the Court of Appeals both gave insufficient deference to the findings of the trial judge and failed to adhere to the teachings of *Bigelow* v. *RKO Radio Pictures, Inc.*, 327 U. S. 251 (1946), and other cases dealing with the standard of proof in treble-damage actions."

These remarks are even more pertinent to the last decision of the court below where a standard of damage proof has been raised which not only reverses *Bigelow* but would make proof of lost profits in the case of exclusion from a market utterly impossible.

This Court analyzed *Bigelow* as follows (AA. 23-24):

> "In *Bigelow*, a treble-damage plaintiff claimed injury from a conspiracy among film distributors to deny him first-run pictures. He offered evidence comparing his profits with those of a competing theatre granted first-run showings and also measuring his current profits against those earned when first-run films had been available to him. This Court, reversing the Court of Appeals, found the evidence sufficient to sustain an award of damages. Although the fact finder is not entitled to base a judgment on speculation or guesswork,
>
> > 'the jury may make a just and reasonable estimate of the damage based on relevant data, and render its verdict accordingly. In such circumstances, juries are allowed to act upon probable and inferential, as well as direct and positive proof. *Story Parchment Co.* v. *Paterson Co., supra*, 561-564; *Eastman Kodak Co.* v. *Southern Photo Co., supra*, 377-379. *Any other rule would enable the wrongdoer to profit by his wrongdoing at the ex-*

> *pense of his victim.* It would be an inducement to make wrongdoing so effective and complete in every case as to preclude any recovery, by rendering the measure of damages uncertain. Failure to apply it would mean that the more grievous the wrong done, the less likelihood there would be of a recovery.' 327 U. S., at 264-265." (Italics ours)

The Court below could not have paid any attention to that rule and reached the result that proof of petitioner's damages shown by this record was insufficient as a matter of law. Thus, the court below says (AA. 59):

> "The measure of proof is the difference between the percentage share that Zenith actually enjoyed during the damage period and the percentage it would have had as a free competitor."

The court below then says (AA. 59-60):

> "There was testimony for Zenith, relied on by the district court, that in the four year damage period, had Zenith been free from the unlawful activity of the Canadian pool which virtually excluded it from the Canadian market, *it would have enjoyed the same proportion of that market as it did in the United States market.* In Canada its principal competitors were the same as those in the United States. Its promotion and advertising flowed back and forth between the two countries. Distributors in Canada were available, but were frightened off by the pool's activities and threats. *It is our view that this was competent evidence, prima facie, upon which the amount of damage could be reasonably approximated by virtue of the Supreme Court's decision in Bigelow* v. *RKO Radio Pictures,* 327 U. S. 251, 264-65 (1946)."

It must be apparent to this Court that in the absence of any contradicting evidence, the proof was not only *prima facie* upon which the amount of damage could be reasonable approximated but conclusive.

This should have ended the issue of amount of petitioner's damages but the court below seizing on a statement in this Court's opinion and quoting it out of context, says (AA. 57):

> "The Supreme Court in noting that the district court did not date the events as occurring before or after the May 22, 1959 start of the damage period, said '[T]he damage award was confined to *injuries* sustained during the damage period, but the trial court apparently deemed it immaterial whether the damage causing acts occurred before or after the start of the damage period.' (Citation.) Damages were awarded, the Court said, on the assumption that were it not for the conspiracy, Zenith would have had 16 per cent of the Canadian market instead of its actual 3 per cent on May 22, 1959 and throughout the damage period. The court then said that since the district court attributed the deficient share on May 22, 1959 to the conduct of the pool, that conduct necessarily preceded the deficiency and therefore pre-damage period conduct necessarily resulted in some part of the damages awarded."

This statement by the court below ignores four controlling considerations which negative the effect which the court below concludes must result in a smaller damage award than that granted by the trial court.

First, if the damage award was to be reduced by the damage caused by predamage illegal activity, it was incumbent upon the respondent to show this and there is no such proof in the record.

Second, this Court did not say that the fact that "the trial court deemed it immaterial whether the damage causing acts occurred before or after the start of the damage period" was error. In fact it said exactly the opposite. It said at (AA. 14):

> "It is enough that the illegality is shown to be a material cause of the injury; a plaintiff need not

exhaust all possible alternative sources of injury in fulfilling his burden of proving compensable injury under § 4. *Continental Ore Co.* v. *Union Carbide & Carbon Corp.*, 370 U. S. 690, 702 (1962); *Perma Life Mufflers, Inc.* v. *International Parts Corp.*, 392 U. S. 134, 143-4 (1968) (concurring opinion)."

Third, this Court said that irrespective of pre-damage period acts there was enough evidence to support the damage award within the four-year damage period. It said (AA. 19):

"We also conclude that the record evidence is sufficient to support a finding of damage resulting from events occurring after the beginning of the damage period. We need not merely assume that the Canadian pool continued throughout the period of this suit, as we are entitled to do in the absence of clear evidence of its termination. (Citations.) HRI frankly conceded the continuation of the pool before the District Court, and it appears sufficiently clear that throughout this time Zenith was deprived of what had always been refused it—a license on pool patents permitting it to sell American-made merchandise in Canada."

This raised the question of the value of the license to Zenith, if freed from the restrictions of the pool, a question determined by the trier of fact with competent evidence in the record.

Fourth, the statement of the court below that Zenith's damage award can be cut down by damage incurred prior to the damage period stems from HRI counsel's argument that since Zenith did not have a mature market at the start of the damage period it could not start its damage computation as if it had the same share of the Canadian market in May 1959 as it had of the market in the United States. *This argument ignores the fact that the reason it did not have a mature market position was because of respondent's illegal conduct.*

The *Bigelow* case, which this Court expressly directed the court below to follow, completely destroys the HRI argument. In that case (327 U. S., 251, 265) this Court said:

> "The wrongdoer may not object to the plaintiff's reasonable estimate of the cause of injury and of its amount, supported by the evidence, because not based on more accurate data which the wrongdoer's misconduct has rendered unavailable.

No proof of whether or not in an open and unrestricted market, Zenith would have had a mature market was possible in Canada on May 22, 1959 because the illegal pool had destroyed an open market and therefore any possibility of such proof. Parenthetically, in the *Bigelow* case, there was no proof that the Jackson Park Theatre had a mature market position with reference to first run films at the time of the start of the damage period. Nevertheless, this court approved the damage computation which assumed such mature market position and approved such assumption over the objections of opposing counsel.

As a practical matter a comparison of Zenith's results in a closed market with those in a free market is the best, and in the instant case the only proof available. To require greater precision and specificity, as the court below attempts *would place the burdens of uncertainty on the victim and not on the wrongdoer where it properly belongs,* and would enable the antitrust violator to diminish his liabilities in direct ratio to the success of his predatory venture. See *Continental Ore Co.* v. *Union Carbide Corp.,* 370 U. S. 690, 697 (1962) and cases there cited.

Actually no objection of any kind was made to petitioner's damage exhibits at the trial. They were admitted in evidence even though they assumed that absent the illegal conspiracy Zenith would have had a mature market position at the beginning of the damage period. The ob-

jection now urged to the damage proofs was not made at the trial and in any event under *Bigelow* it had no merit.

We submit that the proofs of the amount of damage are beyond attack in this case. As the court below itself said in *Milwaukee Towne Corp.* v. *Loew's, Inc.*, 190 F. 2d 561, 566 (7th Cir., 1951), in dealing with similar contentions and similar exhibits:

> "Neither do we need to follow defendants in their detailed argument designed to show numerous fallacies and inaccuracies in the exhibit prepared and submitted by plaintiff's accountant, for the reason that under the rationale of the *Bigelow* case we are satisfied that it was within the province of the trier of the facts to rely upon the computation there disclosed, providing, of course, there was proof of the fact of damage."

Here this Court has already held that there is conclusive proof in the record of the "fact of damage".

II.

THE DECISION OF THIS COURT IN THE INSTANT CASE GAVE THE COURT BELOW NO AUTHORITY TO GRANT A NEW TRIAL ON THE CANADIAN DAMAGE ISSUE.

The court below, without any showing that the trial court abused its discretion in denying a new trial on the Canadian damage issue, has granted a new hearing in the trial court, limiting the issues to be tried in a manner that destroys petitioner's right to recover treble damages for its loss of profits in Canada during the damage period. This it has done in the face of its own decisions that refusal by a trial court to grant a new trial is not subject to review "except upon exceptional circumstances showing a clear abuse of discretion." *Stinebower* v. *Scala*, 331 F. 2d 366, 367 (7th Cir., 1964).

There is no claim that the evidence sought to be offered at a new trial was either unavailable at the time of the original trial or could not have been then offered. In the circumstances it is impossible to conclude that the trial court's denial of HRI's "belated" request to reopen the Canadian damage issue was improper. Cf. *Marconi Wireless Corp.* v. *United States,* 320 U. S., 1, 48 (1943).

Recognizing that the record shows no abuse of discretion on the part of the trial court, HRI counsel say in their brief opposing Zenith's motion for leave to file a petition for mandamus (Misc. No. 1338, Oct. Term, 1969) at p. 31:

> "Thus, this case does not involve questions concerning abuse of discretion or of 'newly discovered evidence' but rather an erroneous ruling of law by the trial court, which, when corrected by the court of appeals required further hearings on the amount of damages."

However, the opinion of the court below grants a complete new trial on the damage issue and gave HRI "an opportunity to introduce evidence to show that Zenith's damage flowing from 'damage causing' acts within the period did not amount to $6,297,391" (AA. 61). This HRI had full opportunity to do before the trial court made its findings. The trial court said: (A. 3527) "The record I want to indicate at this time—there has to be an end of litigation. I don't intend to permit a second chance to do the things that might have been done at the first trial."

The evidence referred to is not limited to "newly discovered evidence" and it has been conceded by HRI that there is not any such evidence (AA. 156).

In the case of *In Re Potts,* 166 U. S. 263, 267 (1897), this Court said:

> "When the merits of a case have been once de-

cided by this court on appeal, the circuit court has no authority, without express leave of this court, to grant a new trial, a rehearing, or a review, or to permit new defenses on the merits to be introduced by amendment of the answer."

The court below has done all of these things with no leave from this Court either express or implied.

The new trial order is limited in such a way that petitioner's damage proofs would be limited to specific items of damage *allocated to specific overt acts.* This completely overrules this Court's opinion that "there is evidence that the pool was not dormant after May 1959. The record contains a letter from the pool to a distributor of Motorola products containing clear warnings against handling unlicensed, imported merchandise. More significant, the fair import of testimony of Zenith officers was that the pool remained active during the damage period and prevented Zenith from establishing an effective distribution system throughout Canada. Zenith was able to obtain independent distributors in the Western Provinces, but it was unable to do so in the Central and the Maritime Provinces, where it necessarily relied on its own subsidiaries for distribution. These officers, experienced businessmen, also testified to the similarities between the Canadian and American markets, attributing Zenith's much poorer Canadian performance to the discouraging and repressive effects of the pool. The Court of Appeals did not refuse to credit this testimony, as HRI insists we should do, but accepting it as some evidence of damage, considered it of insufficient weight to prove injury to Zenith's business. In this respect the Court of Appeals both gave insufficient deference to the findings of the trial judge and failed to adhere to the teachings of *Bigelow* v. *RKO Radio Pictures, Inc.*, 327 U. S. 251 (1945), and other cases dealing with the standard of proof in treble-damage actions" (AA. 22).

That the court below still gives no deference to the findings of the trial judge is shown by the fact that it has vacated the damage findings and judgment and ordered a new trial.

That the court below still refuses to adhere to the teachings of *Bigelow* is shown by the fact that it says that Zenith is only entitled to recover for "an overt act that results in damage to the plaintiff" (AA. 57). That the Court of Appeals does not regard the continuance of the conspiracy and operation of the pool into the damage period as an overt act from which damage may be recovered is shown by its statement that "consequently in the case before us the mere existence of the conspiracy following the 1957 releases does not itself give rise to Zenith's cause of action" (AA. 57).

The court then says, contrary to the express provision of the statute, that the statute of limitations "commences to run from the last overt act of the conspiracy" (AA. 58). The court below apparently believes the only overt act which Zenith is entitled to recover for during the damage period is the June 5, 1959 letter to Zenith from the Canadian pool because the court below says the permissible damage period does not start until June 5, 1959. The court below then finds this act "similar to overt acts occurring in the pre-damage period. Accordingly, Zenith, claiming the right to recover for damage suffered only in the statutory period is entitled to recover for the damages it suffered as a result of the June 5th injury" (AA. 59). The allowance of damages based on a comparison of profits in the restricted markets with those in the United States which this Court approved has been reversed. Further the court below reserves the right to rule on whether the award in a new trial may be "excessive", thus dealing with the case as if it were a personal injury suit (AA. 59).

This Court in *Story Parchment Co.* v. *Paterson P. Paper Co.*, 282 U. S. 555 (1931) disposed of any contention that a reviewing court is free to set aside a judgment based on competent evidence because the court may think it excessive. There this Court said at p. 562:

> "It is true that there was uncertainty as to the extent of the damage, but there was none as to the fact of damage . . . The rule which precludes the recovery of uncertain damages applies to such as are not the certain result of the wrong, not to those damages which are definitely attributable to the wrong and only uncertain in respect of their amount."

See also, *Eastman Kodak Co.* v. *Southern Photo Materials Co.*, 273 U. S. 359, 379 (1927).

We submit that the sort of limitation imposed on the proof of damages contained in the new trial order of the court below would have completely precluded petitioner's damage proofs in *Bigelow* and if allowed to stand, decisions on treble damages rendered by this Court are no longer the law in the Seventh Circuit. The decision of the court below imposing conditions upon the treble damage suit not sanctioned by the Act is a matter of grave public concern because it makes the recovery of treble damages under the antitrust laws impossible in the Seventh Circuit.

Further, it is contrary to the policy of the federal courts as approved by this Court that: "The constant tendency of the courts is to find some way in which damages can be awarded where a wrong has been done. Difficulty of ascertainment is no longer confused with right of recovery." *Story Parchment Co.* v. *Paterson P. Paper Co.*, 282 U. S. 555, 565 (1931). See also *Palmer* v. *Connecticut R. & Lighting Co.*, 311 U. S. 544, 559 (1941) and cases there cited.

III.

THERE IS NO MERIT IN THE BELATEDLY RAISED DEFENSES OF THE STATUTE OF LIMITATIONS AND RELEASE AND THEY WERE WAIVED BY RESPONDENTS' FAILURE TO PLEAD THEM IN ITS ANSWER.

The court below says, in referring to this Court's opinion "The Court also reversed our decision setting aside the award of damages flowing from the unlawful activity of the Canadian pool and remanded that issue to us to consider the effect of HRI's affirmative release and statute of limitations defenses on the award" (AA. 55).

This Court's opinion will be searched in vain to find any remanding order express or implied, for further consideration by the court below of the issues of limitations and release. However, assuming, arguendo, that the court below had this Court's permission to rule on them, the court below has committed clear error in its disposition of these issues in its last opinion.

A. The Statute of Limitations Is Not Applicable to Zenith's Damage Claim.

In using the "belatedly raised" defense of limitations as a basis for granting a new trial, the court below has attempted to turn the clock back to the earlier cases where the courts even attempted to use the limitations statute to bar proofs of the conspiracy itself. See the discussion of this tactic in *Continental Ore Co.* v. *Union Carbide Corp.*, 370 U. S. 690, 699 & 709-10 (1962), where this Court said:

> "... '[T]he character and *effect* of a conspiracy are not to be judged by dismembering it and viewing its separate parts, but only by looking at it as a whole. *United States* v. *Patten*, 226 U. S. 525, 544 ...; and in a case like the one before us, the duty of the jury was

to look at the whole picture and not merely at the individual figures in it, . . .

"The trial court further erred in its persistent exclusion of evidence relating to the pre-1938 period, . . . This evidence was clearly material to petitioner's charge that there was a conspiracy and monopolization in existence when they came into the industry, and that they were eliminated in furtherance thereof." (Italics ours.)

Here the court below has adopted an ingenious argument inspired by HRI counsel that the statute of limitations can be used to bar proof of overt acts outside the damage period even though the damage caused by these acts does not accrue until a time within the damage period. This is a construction which this Court has held as not justified by the antitrust laws.

This Court, in the case of *Radovich* v. *National Football League*, 352 U. S. 445, 453-454 (1957) said:

"Petitioner's claim need only be 'tested under the Sherman Act's general prohibition on unreasonable restraints of trade,' . . . and meet the requirement that petitioner has thereby suffered injury. Congress has, by legislative fiat, determined that such prohibited activities are injurious to the public and has provided sanctions allowing private enforcement of the antitrust laws by an aggrieved party. These laws protect the victims of the forbidden practices as well as the public . . . Furthermore, Congress itself has placed the private antitrust litigant in a most favorable position through the enactment of § 5 of the Clayton Act . . . In the face of such a policy this Court should not add requirements to burden the private litigant beyond what is specifically set forth by Congress in those laws."

Applying the above test, it appears beyond peradventure that the position of the court below is completely untenable under the terms of the Clayton Act itself.

Thus, the statute on which the court below relies is 15 U. S. C. § 15(b) which reads:

> "Any action to enforce any cause of action under sections 15 or 15a of this title shall be forever barred unless commenced within four years after the cause of action accrued."

The important words to be construed are "four years after the cause of action accrued." In the instant case the court below has interpolated into the act the words "overt acts" which if occurring prior to the damage period are barred by limitations even though the damage caused does not accrue until the beginning of the damage period. The court below says: "The law with respect to the statute of limitations in Sec. 15(b) of the Clayton Act is that the period commences to run from the last overt act of the conspiracy" (AA. 58). Based on this false premise the court below held that acts prior to the damage period are barred by limitations even though the damages they caused did not accrue until a time within the damage period. It is quite apparent that the Act says no such thing. It says that the period commences to run when the cause of action "accrued," and under Section 4 of the Clayton Act the cause of action does not accrue until the damage is occasioned.

In the case of *Foster & Kleiser Co.* v. *Special Site Sign Co.*, 85 F. 2d 742, 750 (9th Cir., 1936), cert. den. 299 U. S. 613 (1937), the Court of Appeals correctly states the rule as follows:

> "In a civil action for damages sustained because of a conspiracy in restraint of trade, the right of recovery is not based upon the conspiracy but upon the injuries resulting therefrom. The fact that there may be a criminal conspiracy does not give a plaintiff an action for damages under section 7 of the Antitrust Law, 15 U. S. C. A. § 15 Note, *supra*. *Glenn Coal Co.*

v. *Dickinson Fuel Co.*, 72 F. 2d 885; *Strout* v. *United Shoe Machinery Co.*, 208 F. 2d 646, 651. The gist of the action under this section is for injuries inflicted pursuant to the conspiracy for which the wrongdoer is liable. *Morris & Co.* v. *Nat'l. Ass'n. of Stationers* (C. C. A.), 40 F. (2d) 620. The cause of action arises *when the damage is sustained* and the statute of limitations begins to run at that time." (Italics ours.)

This Court, in its prior opinion, recognized that it was irrelevant whether prior acts of this conspiracy which had occurred outside the damage period had prevented an earlier start in business by Zenith in Canada, if the damage occasioned thereby did not accrue until a time within the damage period, stating (AA. 18):

"This evidence clearly warrants the inference that CRPL's past conduct interfered with and made more difficult the distribution of Zenith's products in 1959 and later years. The district court could reasonably conclude that the cumulative effects of the pool's campaign against imported goods had consequences lasting well into the damage period. It could also rationally be found from the evidence that Zenith, beginning in 1958, could not have reached its maximum potential by May 22, 1959, that the pool had effectively prevented an earlier beginning, and that Zenith therefore suffered damage during the damage period from having a smaller share of the market than it would have had if the pool had never existed."

Thus, unlawful acts or activity resulting in loss of profits during the damage period was not barred by the statute of limitations under the terms of the Act itself and this Court in a recent case has expressly held that the statute of limitations only bars recovery of damages occurring before the four-year statutory cut-off date. See *Hanover Shoe Inc.* v. *United Shoe Mach. Corp.*, 392 U. S. 481, 501, n. 15 (1968), where this Court says:

"We are not dealing with a violation which, if it

> occurs at all, must occur within some specific and limited time span . . . Rather, we are dealing with conduct which constituted a continuing violation of the Sherman Act and which inflicted continuing and accumulating harm on Hanover. Although Hanover could have sued in 1912 for the injury then being inflicted, it was equally entitled to sue in 1955."

The Court of Appeals in the same case said, 377 F. 2d at p. 795:

> ". . . the fact that some of the injury and damage occurred outside the statutory period does not affect the plaintiff's right to recover for the separate invasion of its rights which occurred within the period."

The only damage sought or recovered in the instant case was the loss of profits occurring in the four-year damage period.

Finally, this Court indicated that the statute of limitations even if applicable would not run during the pendency of the instant suit and that the counterclaim would relate back to the filing of the instant suit, thus making the entire limitations issue irrelevant because there is no evidence that beginning four years prior to November 20, 1959 when the suit was started and in the intervening time up and until the beginning of the damage period Zenith absent the Pool could not have gained a mature market position. In fact every inference is that Zenith would have had ample time to do just that.

B. The Statute of Limitations Was Tolled in the Instant Case.

The Court of Appeals held not only that HRI was entitled to reduce the damage award by any damages found to be attributable to pre-damage period acts irrespective of whether the damage accrued during the damage period,

but also held that petitioner was precluded from asserting that the statute of limitations was tolled. Petitioner asserted in the court below and here that the statute was tolled during, and for one year after, the pendency of *United States* v. *General Electric et al.* (Civil Action No. 140-157, S. D. N. Y.), in the Southern District of New York from November 24, 1958 to November 1, 1963 (Pl. Ex's. 44-47, A. 2754-82).

The court below based its holding on the grounds (1) that the issue was not before the court because Zenith had not pleaded tolling, and (2) that in any event, under its earlier *Sun Theatre* decision, 213 F. 2d 284, 292, tolling did not apply to a named co-conspirator such as Hazeltine, but only applied to a party defendant in the government suit.

In answer to the first contention, it is apparent that there was no opportunity to plead tolling in the trial court since recovery of damages was limited to the four-year statutory period and the statute of limitations was not pleaded until a year after the trial, at which time the trial court properly refused to reopen the case. There was no duty on Zenith's part to anticipate this affirmative defense by pleading tolling in its counterclaim nor would Zenith be required to file a further pleading in response to the defense of limitations even if it had been asserted in the respondent's reply to the counterclaim as required by Fed. R. Civ. P. 8(c). Fed R. Civ. P. 7 expressly states that there shall only be a reply to a counterclaim and that "No other pleading shall be allowed, except that the court may order a reply to an answer or a third party answer." No court ordered Zenith to file a further pleading in response to the plea of limitations which HRI tendered in support of its motion to dismiss one year after the case had been tried.

In answer to the second contention, it is sufficient to point

out that the earlier case of *Sun Theatre Corp.* v. *RKO Radio Pictures, Inc.*, 213 F. 2d 284, 292 (7th Cir., 1954) which the court below relied upon in saying "in any event, the law of this circuit is that the tolling of the limitation protects a plaintiff in a private antitrust suit only with respect to a party defendant in a government suit" (AA. 59) is in direct conflict with the decisions of this Court and of the Court of Appeals for the Third and Eighth Circuits.

The *Sun Theatre* case was decided before § 5 of the Clayton Act was amended by the Congress in 1955. After the amendment of the statute, the Eighth Circuit squarely decided that the statute of limitations was tolled as to named co-conspirators in a government action. *Hardy Salt Co.* v. *State of Illinois*, 377 F. 2d 768 (8th Cir., 1967), cert. den. 389 U. S. 912 (1967). This decision was subsequently extended by the Third Circuit which held that the tolling provisions of Section 5(b) applied to unnamed co-conspirators as well. *State of New Jersey* v. *Morton Salt Co.*, 387 F. 2d 94 (3rd Cir. 1967), cert. den. 391 U. S. 967 (1968). Hazeltine was a *named* co-conspirator in the government action against General Electric, et al, and the conspiracy asserted there was found by the court below to be the same as the one asserted here.

The construction adopted by the court below in the 1954 *Sun Theatre* case that tolling only occurred when a judgment or decree would have an estoppel effect was expressly rejected by this Court in *Minnesota Mining & Mfg. Co.* v. *New Jersey Wood Finishing Co.*, 381 U. S. 311 (1965), and *Leh* v. *General Petroleum Corp.*, 382 U. S. 54 (1965). Parenthetically, in *Leh*, tolling was not pleaded in the complaint and was raised for the first time after defendants had moved for summary judgment on the ground the action was barred by the limitations defense raised in the answer.

C. The RCA-Zenith 1957 Release Did Not Affect Zenith's Treble Damage Claim Based Upon Damage Occasioned Zenith from June 1, 1959 to May 31, 1963.

The court below said in its last opinion "Since HRI was an unnamed joint tortfeasor, as admitted by Zenith at trial, with its co-conspirators in the Canadian pool who were named in the *Rauland* case, and Zenith did not reserve its right against HRI, the releases given by Zenith clearly barred recovery from HRI of past, present and *future damages* flowing from any misconduct of HRI prior to the dates of the releases" (AA. 57).

This statement not only extends the common law rule as to releases but attempts to bar Zenith's recovery for damages occasioned by the Canadian pool after October, 1957, the date of the release. This, of course, is against public policy. In *Westmoreland Asbestos Co.* v. *Johns-Manville Corp.*, 39 F. Supp. 117, 119 (S. D. N. Y., 1941), aff'd. 136 F. 2d 844 (2nd Cir., 1943), the District Court said in speaking of a similar release:

> "Indeed, if the instrument purported to absolve defendants from liability for future violation of the anti-trust statutes, I should hold it void as against public policy . . . in my opinion defendant's contention that the release is a bar as to causes of action subsequently arising cannot be sustained."

We have already shown above that the instant case is a cause of action "subsequently arising" because the damages accruing during the damage period were not in existence until the damage period—and could not have accrued at all if the Canadian Radio Patents Pool had been ended. Cf. *Connecticut Importing Co.* v. *Frankfort Distilleries*, 101 F. 2d 79, 81 (2nd Cir., 1939).

In the trial court, HRI counsel in colloquy with the Court said ". . . there are cases which say if you try to

release the effect of a future violation that that is against public policy" (AA. 229). Certainly this Court has never sanctioned the release of a future violation of the antitrust laws. If that could be so, then HRI had a blank check to continue the pool, which during its entire existence threatened the same illegal conduct which was in issue in the RCA litigation. Further, Zenith could not sue for its lost profits for the damage period starting in May, 1959 in September, 1957 when the release was executed. For these damages to accrue, two things were necessary:

(1) The Canadian pool had to continue in operation from 1959 through the damage period; and

(2) The operation of the pool had to continue to restrict Zenith's profits in Canada.

In *Lawlor* v. *National Screen Service Corp.*, 349 U. S. 322 (1954), this Court said at 327-8:

> "That both suits involved 'essentially the same course of wrongful conduct' is not decisive . . . While the 1943 judgment precludes recovery on claims arising prior to its entry, it cannot be given the effect of extinguishing claims which did not even then exist and which could not possibly have been sued upon in the previous case."

That this Court, in view of the public interest involved in the enforcement of the antitrust laws, is not inclined to extend common law doctrines of constructive release in order to bar a plaintiff's suit for treble damages is shown by the case of *Mercoid Corp.* v. *Mid-Continent Invest. Co.*, 320 U. S. 661, 670 (1943) where this Court expressly approved the statement that:

> "Courts of equity may, and frequently do, go much farther both to give and withhold relief in furtherance of the public interest than they are accustomed to go when only private interests are involved."

In the case of *Sola Electric Co.* v. *Jefferson Electric Co.*, 317 U. S. 173 (1942), the common law doctrine of estoppel was sought to be asserted to preclude proof of a violation of the antitrust laws by price fixing agreements attached to the license of a patent. This Court said, at p. 176:

> "When a federal statute condemns an act as unlawful, the extent and nature of the legal consequences of the condemnation, though left by the statute to judicial determination, are nevertheless federal questions, the answers to which are to be derived from the statute and the federal policy which it has adopted. To the federal statute and policy, conflicting state law and policy must yield . . . The federal courts have been consistent in holding that local rules of estoppel will not be permitted to thwart the purposes of statutes of the United States."

Here, the court below has allowed the common law rule of constructive release to destroy petitioner's rights in part at least against HRI, which paid nothing to petitioner, and which was not named in the release, thereby thwarting the policy of the antitrust laws to deter the denial of a foreign market in Canada to petitioner. The issue is one of first impression in this Court and is one we submit which should be decided with the policy of the federal statute in mind so as to further the high purpose of the antitrust laws.

In *Fox Midwest Theatres* v. *Means*, 221 F. 2d 173, 180 (8th Cir., 1955), the Court of Appeals said:

> "Any contractual provision which could be argued to absolve one party from liability for future violations of the antitrust statutes against another would to that extent be void as against public policy. . . . This is because the effect of such a release could be to permit a restraint of trade to be engaged in, which would have impact, not simply between the parties, but upon the public as well. Such a release, if recognized as having

any validity of that nature, could therefore itself operatively serve as a contract 'in restraint of trade.' Section 1 of the Sherman Anti-Trust Act, 15 U. S. C. A. § 1, of course, brands all contracts in restraint of trade as 'illegal.' "

The effect of the holding of the court below is that a release given to some of HRI's co-conspirators in 1957 granted HRI and the pool immunity to operate forever free from treble damage suits and even though this Court expressly finds the pool in operation all during the damage period and causing damage to Zenith during all that time. This Court said in its opinion (AA. 14):

"Once Zenith demonstrated that its exports from the United States had been restrained by pool activities, the treble damage liability of the domestic companies participating in the conspiracy was beyond question."

D. In Any Event the Affirmative Defenses of Statute of Limitations and Release Were Waived.

The court below says in its last opinion (AA. 56):

"The Supreme Court noted that the district court's refusal to disturb the findings it had already made with respect to the Canadian pool *was a rejection of the defenses either on the merits or on the ground that the defenses had been waived under Fed. R. Civ. P. 12 (h). 395 U. S. 100, 117, n. 13. It is our view that the court's ruling was not on the basis of waiver, but because the defenses on their merits did not bar Zenith's recovery.*"

There is nothing in this record to support the view that the District Court's ruling was not based on waiver. In fact the opposite appears by the following colloquy (AA. 237):

"The Court: You do agree that the statute of limitations can be waived, you do agree to that, don't you?

"Mr. Kayser: Yes, but I shall come to that in a moment, sir."

The Court of Appeals attempts to get rid of the waiver issue by simply ignoring it and we submit that handling of the matter cannot be sustained. This Court has held that the decision of a trial court can be affirmed on any ground shown in the record. See *Helvering* v. *Gowran*, 302 U. S. 238, 245 (1937) where this Court said, at p. 245:

> "In the review of judicial proceedings the rule is settled that if the decision below is correct, it must be affirmed, although the lower court relied upon a wrong ground or gave a wrong reason."

Under the decision of this court in *Delk* v. *St. Louis & S. F. R. Co.*, 220 U. S. 580, 588 (1911), "As the case is here upon certiorari to review the judgment of the circuit court of appeals, this court has the entire record before it, with the power to review the action of that court, as well as direct such disposition of the case as that court might have done . . ."

The waiver shown in the instant case is abundantly supported by the record of proceedings on the motions filed by respondent after the case was decided. The affirmative defenses of the statute of limitations and release were not presented until a year after the case had been tried and the trial court had entered its findings of fact and conclusions of law. The record of these proceedings which has now been printed in full (AA. 65-254) show beyond question that the trial court considered these defenses belatedly presented and waived.

The federal precedents hold that "an affirmative defense which is neither pleaded as required by rule 8(c) nor made the subject of an appropriate motion under rule 12(b) is waived. The waiver is final if the defendant fails to correct the omission either prior to trial or during trial, as is permitted by rule 15 (a) (b) of the Federal Rules of Civil Procedure, 28 U. S. C. A." *Systems, Inc.* v. *Bridge Elec-*

tronics Company, 335 F. 2d 465, 466 (3rd Cir., 1964). See also *Wagner* v. *Fawcett Pubn's.,* 307 F. 2d 409, 412 (7th Cir., 1962) cert. den. 372 U. S. 909 (1963).

Rule 8 (c) provides "In a pleading to a preceding pleading, a party shall set forth affirmatively . . . release . . . and any other matter constituting an avoidance or affirmative defense . . ."

In *Roe* v. *Sears, Roebuck & Co.,* 132 F. 2d 829, 832 (7th Cir., 1943), the court below said:

> "Defendant's motion for summary judgment was not made until after it had filed its answer. Rule 8(c) of the Rules of Civil Procedure requires a party 'pleading to a preceding pleading [to] set forth affirmatively . . . [the] statute of limitations.' Rule 12 provides that the party 'waives all defenses * * * which he does not present . . . in his answer."

The Court went on to say that waived defenses could not be revived by a defendant through the expedient, used in the instant case, of filing a motion for summary judgment.

> "Defendants having failed to plead the statute of limitations, it was waived. Defendants subsequent motion for a summary judgment did not revive a defense which had been waived. . . ."

See also *Tornello* v. *Deligiannis Bros.,* 180 F. 2d 553, 556 (7th Cir., 1950); *Oedekerk* v. *Muncie Gear Works,* 179 F. 2d 821, 842 (7th Cir., 1950).

Here, HRI never even asked for leave to amend its answer to plead the statute of limitations and release defenses but attempted to raise them on motion for summary judgment more than a year after the case had been tried.

The District Court held that HRI showed no adequate grounds to excuse the late pleading of these affirmative

defenses. That the record shows no basis for reviving these defenses after they had been waived is established by the following: The only ground urged then or since by HRI to permit it to file its defenses a year and a half later was that Zenith had changed its damage theory to the surprise of respondent (A. 2943). HRI counsel expressly disclaimed that HRI was seeking to reopen the proofs on the basis of newly discovered evidence (AA. 156).

The District court rejected HRI's change of damage theory, out of hand, as a sham, pointing out that the pleadings and pre-trial briefs made Zenith's damage theory plain to anyone able to "understand the English language" (AA. 144, 158, 74, 87).

The district court permitted HRI leave to file the defenses of limitations and release for "the sake of the record" (AA. 164, 251). This HRI had a right to do even if it had not been ordered because the Clerk of the Court does not refuse the filing of documents in a case. In answer to Zenith's objections that the defenses were not filed with the answer and therefore waived, the district court said "the record will show that leave is given to file them at this time [April 1, 1965] after proofs have been closed and after findings have been made." (AA. 251). The court then proceeded to deny HRI's motion to withdraw the findings and reopen the proofs as to Canada (AA. 251).

The Court said (AA. 251):

> "In regard to Canada there will be no change in the findings as far as the court is concerned."

Since the motion to withdraw the findings and dismiss the counterclaim as to Canada was based on the same grounds as those urged to excuse the late pleading of the affirmative defenses—namely, that Zenith had changed its theory of action—the denial of the motion was necessarily a rejection of these grounds and a holding that the defenses

were as this Court put it—"belatedly raised" and therefore waived.

CONCLUSION.

For the reasons set forth above, Zenith prays that the decision of the court below be reversed with directions that the judgment entered by the District Court on April 5, 1965, be affirmed together with statutory interest thereon.

Respectfully submitted,

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FILED
JUN 1 1970
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969.

No. ~~1119~~ 80

ZENITH RADIO CORPORATION, A CORPORATION,
Petitioner,

vs.

HAZELTINE RESEARCH, INC., A CORPORATION,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR RESPONDENT HAZELTINE RESEARCH, INC.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969.

No. 1117

ZENITH RADIO CORPORATION, A CORPORATION,
Petitioner,

vs.

HAZELTINE RESEARCH, INC., A CORPORATION,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR RESPONDENT HAZELTINE RESEARCH, INC.

QUESTIONS PRESENTED

Zenith's statement of questions presented repeatedly suggests that this Court in its decision and the Court of Appeals in its most recent decision reached factual or legal conclusions which were not reached. Based upon the actual rulings of the Court of Appeals, the questions presented are:

1. Whether the Court of Appeals was correct in holding that the affirmative defenses of release and statute of limitations are in the case?

2. Whether the Court of Appeals was correct in holding that the September 27, 1957 general releases executed by

Zenith bar the recovery of damages sustained by Zenith after the releases, caused by illegal conduct occurring prior to the releases?

3. Whether the Court of Appeals was correct in holding that the statute of limitations (15 U.S.C. § 15(b)) bars the recovery by Zenith of damages caused by illegal conduct occurring prior to the damage period?

4. Whether the Court of Appeals properly gave effect to the legal bars of the releases and statute of limitations by ordering a remand to the trial court for further hearings on the amount of recoverable damages as to Canada, since a substantial but undetermined part of the original damage award necessarily resulted from pre-release and pre-damage period conduct?

In light of Zenith's arguments the following subordinate questions are presented:

a. Does *Bigelow* v. *RKO Radio Pictures* require that the statute of limitations and the law of settlement and release not be applied against Zenith?

b. Does public policy require that Zenith be awarded damages barred from recovery by release and limitations?

STATEMENT OF THE CASE

Zenith's Statement of the Case (Z. Br. 6-13)[1] makes no reference to important aspects of the litigation and fails to

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[1] The following abbreviations are used in this brief:

Z. Br. ..... Brief for Petitioner Zenith Radio Corporation.
PX ..... Plaintiff's Exhibit.
DX ..... Defendant's Exhibit.
A. ..... Citations to the printed Appendix in No. 49, October Term, 1968.
AA. ..... Citations to the additional printed Appendix herein.

represent accurately the decision of this Court and the decisions of the courts below. For example, Zenith attempts to create the impression, both in its Statement and elsewhere in its brief, that this Court passed upon and approved the trial court's finding as to the *amount* of damage, when in truth this Court held only that there was sufficient evidence to sustain the trial court's inference as to the *fact* of damage as to Canada, leaving the undecided issues of release, limitations and amount of damage for the Court of Appeals.

To the extent necessary for an understanding of the issues presently before the Court, we will describe briefly what occurred and what was decided in the prior decisions, both in this Court and in the lower courts.

I. THE TRIAL COURT DECISION (A. 2859; 239 F. SUPP. 51).

On November 20, 1959, Hazeltine Research, Inc. (HRI) filed suit in the Northern District of Illinois against Zenith for infringement of a single U.S. patent relating to television apparatus (A. 11-13). On April 7, 1960, Zenith filed its answer alleging invalidity and non-infringement and further alleging that the patent was unenforceable by reason of patent misuse and unclean hands (A. 14-19). No counterclaim was included with Zenith's answer.

On May 22, 1963, over three years later, Zenith filed its counterclaim against HRI for damages charging violation of Sections 1 and 2 of the Sherman Act (15 U.S.C. §§ 1, 2) (A. 64-69). In support of its motion for leave to file the counterclaim at such a late date, Zenith filed the sworn statement of Francis Crotty, a Zenith vice president and a counsel of record, that the matters "which are the proximate cause of damages alleged and require the relief sought in said counterclaim, *occurred after the filing of the answer*

herein," i.e., after April 7, 1960 (A. 63).[2] The same representation was made by Zenith in its motion for leave to file the counterclaim (A. 62).

In January, 1965 the trial court adopted and entered verbatim the findings of fact and conclusions of law proposed by Zenith. These findings stated that the foreign patents of Hazeltine Corporation, HRI's parent, were licensed to patent pools in England, Australia and Canada and that these pools over a period of many years had refused to license Zenith's imported radio and television sets and had brought or threatened suit against distributors and dealers who handled Zenith's imported radio and television sets in the three countries involved. The trial court held that these patent pools constituted conspiracies in restraint of trade and that HRI was a co-conspirator and thereby liable for the acts of the patent pools (Findings XV through XXXV, A. 2899-2907).[3]

Zenith's damage calculation was based on what was later referred to in the proceedings as the "mature market" or "established market" theory (*e.g.*, A. 3033, 3204). Zenith asserted that it was entitled to recover damages on the basis of sales and profits it supposedly could have realized during the four-year damage period (minus actual sales

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[2] Throughout this brief where emphasis appears in quotations it has been supplied by us unless otherwise indicated.

[3] Contrary to Zenith's assertion (Z. Br. 6) the trial court did *not* hold that the instant patent infringement suit was pursuant to a conspiracy to bar Zenith from the Canadian market. There was no such finding. The statements of the trial court made after the findings were entered (A. 3031-32), of Zenith's counsel (A. 428; Zenith Post Trial Brief in trial court, pp. 39-40), and the findings that were entered (Finding XIII, A. 2898-99) all confirm that the domestic negotiations and infringement suit had nothing to do with the Canadian pool.

and profits), had the pools' pre-damage period conduct not prevented Zenith from entering the damage period with a "mature" or "established" market, and had the pools not prevented a further increase in market share during the damage period (A. 3203-3204; see also A. 457, 461, 465; DX 220, A. 2661). Wright, Zenith's president, and Kaplan, its executive vice president, testified that but for the long-standing interference by these patent pools in the various countries, Zenith, during the four-year period involved here (May 22, 1959-May 22, 1963), would have had a share of the Canadian market equal to the share it had built up in the United States, a percentage share of the English market equal to one-fourth its U.S. percentage, and a percentage share of the Australian market equal to one-tenth its U.S. percentage (A. 457, 461, 465, 528-29).

Following adoption of Zenith's proposed findings by the trial court, *but prior to entry of judgment,* HRI's new counsel filed a Motion for Withdrawal of Antitrust Findings and Conclusions and for Other Relief (A. 2939-51) and made an offer of proof (A. 2957-95). The motion stated several grounds for the relief requested, including the affirmative defenses of release and statute of limitations, the governmental embargoes in England and Australia, and also equitable considerations. During proceedings following this motion, the trial court granted leave to HRI to file the defenses of release and statute of limitations (A. 3037), but HRI's motion to dismiss on these grounds (A. 3048) was then denied (A. 3062) and judgment for $18,892,173 as to Canada was entered (A. 3078-80). However, the trial court granted a limited reopening of the proofs with respect to England and Australia, and at hearings in October 1965, HRI proved and the trial court held that governmental embargoes in those countries, and *not* the patent pools, had

barred Zenith's entry into those markets prior to the start of the damage period (A. 3202-06).

Following proof of the embargoes, the trial court required that Wright and Kaplan be recalled to testify further concerning the basis on which they had made their market share estimates with respect to England and Australia (A. 3204), which the trial court characterized as a "guesstimate" (A. 3526). In their testimony on recall they confirmed that Zenith's claim as to Canada had indeed been based on the established market theory; but as to England and Australia they asserted for the first time that the damage calculation had been based upon starting the damage period with a zero share of the market (A. 3437-40, 3490-91). Although the trial court in the light of this changed theory found their estimates as to England and Australia to be exaggerated (A. 3525-26), it nevertheless entered judgment in favor of Zenith with respect to England and Australia, merely reducing the amount of the treble damage award for these two countries from $30 million (A. 2908) to about $16 million after trebling (A. 3539).

II. THE COURT OF APPEALS' DECISION OF DECEMBER 19, 1967 (A. 4238; 388 F.2d 25).

On appeal, HRI urged several grounds for reversal, including (1) failure to prove the fact of damage in all three countries, (2) the bar of the statute of limitations (15 U.S.C. § 15(b)), (3) the 1957 releases given in settlement of prior RCA-Zenith litigation (see pp. 22-24, *infra*), and (4) that the damages awarded were excessive. The Court of Appeals reversed the trial court's treble damage judgment as to Canada (as well as the other two countries) *solely* on the basis of Zenith's failure to prove the "fact of damage,"

stating that:

> "We agree with HRI that Zenith failed to sustain the burden of proving the essential *fact* of damage in the relevant period. *We need pass on no other contention, therefore,* in reversing the judgment on the counterclaim" (A. 4254).

III. THIS COURT'S DECISION OF MAY 19, 1969 (AA. 4; 395 U.S. 100).

The Court, in reversing the Court of Appeals as to Canada,[4] did so solely on the "fact of damage" issue, carefully noting that there were several "major points" raised by HRI in the Court of Appeals, and that the Court of Appeals had not yet passed upon them (AA. 13; 395 U.S. at 113). This Court said:

> "We have concluded that the Court of Appeals erred in setting aside the District Court's decision with respect to the *fact of damage* in Canada. Zenith's evidence, although by no means conclusive, was sufficient to sustain the inference that Zenith had in fact been injured *to some extent* by the Canadian pool's restraints upon imports of radio and television sets" (AA. 14; 395 U.S. at 114).[5]

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[4] The Court agreed with the Court of Appeals in setting aside the remaining amount of the judgments as to England and Australia on the ground that no "fact of damage" had been proved (AA. 14; 395 U.S. at 114). The Court also agreed that the judgments against Hazeltine Corporation were properly vacated by the Court of Appeals (AA. 10; 395 U.S. at 110).

[5] Zenith asserts that "this Court has already held that there is *conclusive proof* in the record of the 'fact of damage'" (Z. Br. 26; see also Z. Br. 21). However, as shown by the above quotation, the exact holding of this Court was that Zenith's evidence on the fact of damage as to Canada was "*by no means conclusive*", but was sufficient to sustain the inference of the fact of damage in that market.

Thus, this Court held that the evidence was sufficient to sustain an inference that Zenith had in fact been injured *"to some extent,"* but left open and did not decide the question of the extent of Zenith's injury.

Contrary to Zenith's representations, this Court did not decide the other issues on the Canadian damage claim raised by HRI in the Court of Appeals. In fact, to the extent that these other issues were referred to, the Court explicitly refrained from deciding them:

(a) The Court referred to the question whether the trial court's failure to give effect to the defenses of release and limitations was a ruling on the merits or was on the ground of waiver, but pointed out that "[t]he parties have not argued the matter" and stated it would not pass on this issue (AA. 17 n. 13; 395 U.S. at 117 n. 13) (see pp. 49-57, *infra*).

(b) The Court referred to the relevance of the 1957 releases to the Canadian damage claim, stating that the "release appears to be relevant only to Zenith's claim for injury to its Canadian trade" (AA. 13 n. 7; 395 U.S. at 113 n. 7), but did not rule as to the effect to be given to the releases (see pp. 22-33, *infra*).

(c) The Court referred to the question whether the statute of limitations barred recovery of damages resulting from pre-damage period conduct, but pointed out that the matter had not been argued and stated it would *not* "deal with the question of whether damage period injury from pre-damage period conduct is recoverable . . ." (AA. 17 n. 13; 395 U.S. at 117 n. 13) (see pp. 33-42, *infra*).

(d) While not passing on their merits, the Court also recognized the potential effect of these defenses on the amount of recoverable damages. The Court pointed out that the amount of damages as to Canada had been deter-

mined on the assumption that, absent the activities of the Canadian pool, Zenith *"would have had 16%* of the Canadian television market on May 22, 1959 [the first day of the damage period], and throughout the damage period *rather than its actual 3% share"* (AA. 16; 395 U.S. at 116). The Court then said:

> "Since the failure to have 16% of the market on the first day of the damage period was ascribed to pool operations, *those operations must have occurred prior to May 22, 1959.* Some part of the damages awarded, therefore, *necessarily resulted from pre-damage period conduct"* (AA. 16; 395 U.S. at 116-17).[6]

Thus, the affirmative defenses, if held to apply, necessarily barred recovery by Zenith of some part of the $18,892,173 award of the trial court.

Having reversed the Court of Appeals' ruling solely on the fact of damage issue, this Court's remand "for further proceedings consistent with this opinion" (AA. 40; 395 U.S. at 141), left the remaining undecided issues for decision by the Court of Appeals (pp. 57-62, *infra*).

IV. THE COURT OF APPEALS' DECISION OF OCTOBER 27, 1969 ON REMAND (AA. 54; 418 F.2d 21).

On remand, the Court of Appeals did not disturb or question this Court's holding that the fact of damage as to Canada had been proved. It considered only the questions which it had originally left undecided with respect to Canada, acknowledging that this Court had "concluded we erred in our determination that Zenith had failed to prove the 'fact' of damage in Canada" (AA. 55). The Court of Appeals concluded that the issues remaining before it on

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[6] Similarly, Zenith asserted that its share of the Canadian radio market at the start of the period should have been about 13% rather than its actual share of about 4% (DX 220, A. 2661).

remand were the following:

> "(1) whether Zenith's injury during the statutory damage period resulted to any extent from HRI's conduct preceding that period and, if so, what effect releases given by Zenith in 1957 had on Zenith's recovery; (2) what effect the statute of limitations had on HRI's liability; and (3) whether the award of damages was excessive. *These points had been raised before us by HRI in the first appeal, but we saw no need of passing on them in view of our reversal of the judgment for Zenith*" (AA. 55).

The Court of Appeals then held that:

(a) the defenses of release and limitations had not been waived, and the trial court had considered and (erroneously) rejected them on their merits (AA. 56);

(b) HRI as an alleged joint tortfeasor was entitled to the benefit of the September 27, 1957 releases given by Zenith as part of the settlement of the RCA-Zenith litigation (pp. 22-24, *infra*) and these releases barred recovery for "past, present and *future damages* [emphasis by the Court of Appeals] flowing from any misconduct of HRI prior to the dates of the releases" (AA. 57);

(c) the limitations defense was a bar to Zenith's recovery for damages resulting from conduct which occurred prior to the start of the damage period (*i.e.*, prior to May 22, 1959), so that Zenith's recovery was limited to damages resulting from conduct "occurring in the damage period" (AA. 58);[7]

(d) neither the release nor the statute of limitations defense was a complete bar to Zenith's Canadian damage

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[7] Contrary to Zenith's assertions, the question whether or not the statute of limitations is tolled as against a party in a civil action who was not a defendant in government litigation was not before the court (see pp. 42-49, *infra*).

claim because some damage-causing pool conduct had occurred within the limitations period (AA. 58-59); and

(e) the measure of damages is "the difference between the percentage share that Zenith actually enjoyed during the damage period and the percentage it would have had as a free competitor" (AA. 59), *i.e.*, the damages which are attributable to the conduct of the patent pool during the damage period.

The Court of Appeals noted that this Court had pointed out that the original award was based on the assumption that but for the pool's pre-damage period conduct, Zenith would have started the four-year period with 16% of the market instead of the 3% it actually had (AA. 57), and that some part of the damages awarded *"necessarily resulted from pre-damage period conduct"* (AA. 60). Since there were no findings or evidence which would permit the assessment of damages on the proper basis (*i.e.*, the profits Zenith would have achieved in the damage period but for the operations of the Canadian pool *in the damage period*), additional proceedings in the trial court were necessary. Accordingly, the Court of Appeals ordered a remand to the trial court for further hearings to give HRI the opportunity to offer evidence "aimed at excluding from recovery damages flowing from pre-period 'damage-causing' acts, as well as an opportunity to introduce evidence to show that Zenith's damage flowing from 'damage-causing' acts within the period did not amount to $6,297,391" (AA. 61).[8]

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[8] Contrary to Zenith's assertion (Z. Br. 29) the Court of Appeals did not hold that on remand Zenith's recovery was limited to any damages resulting from the June 5, 1959 letter from the pool to Zenith, but pointed to the letter as an example of conduct taking place during the period which could form the basis for a damage award (see p. 67, *infra*).

SUMMARY OF ARGUMENT

I. The Court of Appeals Was Correct In Holding that the Damage Award Should Exclude Damages Resulting from Conduct of the Canadian Pool Which Occurred Prior to the Releases or Prior to the Limitations Period.

The importance of the release and limitations defenses.

The amount of damages originally awarded by the trial court was calculated on the assumption that but for the interference of the Canadian pool going back over many years prior to the start of the damage period (May 22, 1959-May 22, 1963), Zenith would have been doing business and building up a market in Canada and would have *entered* the damage period with a "mature" or "established" market from which it would have realized sales and profits during the damage period. Zenith's witnesses estimated that this market would have been equal in percentage share to the market developed by Zenith in the United States where it had been marketing radios since the 1920's, and television sets since 1948.

As this Court pointed out in its opinion, "some part" of the original damage award "necessarily resulted from pre-damage period conduct" because damages were awarded on the assumption that Zenith "would have had 16% of the Canadian television market on May 22, 1959, and throughout the damage period rather than its actual 3% share." Since Zenith claimed that its beginning market share as to television was less than one-fifth of what it would have been but for the pool's conduct, a substantial part of the claimed damages necessarily resulted solely from pre-damage period conduct.

The effect of the releases.

Zenith released any claim for damages caused by conduct of the Canadian pool taking place prior to September 27,

1957. In settlement of prior litigation against RCA, GE and Western Electric involving the same charges with respect to the Canadian patent pool as are made in this case, Zenith executed general releases on September 27, 1957, releasing not only the damages which had been sustained prior to the date of the releases, but also by their express terms releasing any *future damages caused by acts prior* to the releases. Thus the releases bar that part of the original damage award against HRI for lack of market share and loss of profits which is attributable to the Canadian pool's interference during the many years prior to September 27, 1957, with Zenith's ability to build up its Canadian market share.

Zenith has asserted that HRI was a co-conspirator with the parties to whom the releases were given in the settlement of the *RCA-Zenith* case. Since the releases do not reserve rights against third parties, HRI as an alleged co-conspirator is entitled to the benefit of the releases and Zenith has so admitted earlier in this litigation.

The cases cited by Zenith which hold that it is contrary to public policy to release liability for "future violations" of the antitrust laws, have no application because the releases involved here do not release damages from future violations, only future damages from past conduct.

The effect of the statute of limitations.

The statute of limitations (15 U.S.C.§15(b)) bars recovery of that part of the amount of damages originally awarded to Zenith which resulted solely from pre-damage period conduct. The statute bars any action not brought within four years after the date that the cause of action accrued. A cause of action for treble damages accrues when the damage-causing conduct takes place, and the wronged party can then sue to recover all damages, including future damages, resulting from that illegal conduct.

Contrary to Zenith's contention, a new cause of action does not arise each day or each time additional damages accumulate by reason of previous conduct. When the illegal damage-causing conduct takes place, the claimant may sue then not only for the damages which it has suffered, but also those it will suffer in the future by reason of that damage-causing conduct. Thus, prior to May 22, 1959, Zenith could have sued (subject to the bar of the releases) not only for the profits it had by then actually lost as a result of pool interference during the preceding four years, but also for the profits it would lose in the future by reason of that interference with Zenith's market build-up.

The trial court's original award included damages which "necessarily" were attributable solely to the fact that the Canadian pool by its conduct beginning over 30 years prior to May 22, 1959, had allegedly prevented Zenith from building up a mature market position in Canada by May 22, 1959. The recovery of these damages is barred by the statute of limitations.

Tolling is not before the Court.

Zenith's claim that the statute of limitations was tolled back to November, 1954 by reason of government litigation to which HRI was not a party is not before this Court because it was neither pleaded nor raised in the trial court and was not ruled upon by the Court of Appeals. Moreover, Zenith would be prevented from asserting tolling because it obtained leave to file its counterclaim upon the sworn representation that the damages it sought by the counterclaim were caused by alleged illegal conduct taking place *after the filing of the answer* (on April 7, 1960). For Zenith to have asserted that tolling entitled it to rely upon conduct going back to November, 1954 as a basis for recov-

ery of damages would have been in direct conflict with its sworn representations. In any event, there would not be tolling here because tolling does not apply to a defendant in private litigation who was not a defendant in the government litigation.

The defenses are in the case.

Although the defenses of release and limitations were not contained in HRI's reply to Zenith's counterclaim, they were pleaded by HRI with leave of court prior to entry of judgment as to Canada. Contrary to Zenith's contention, the trial court did not hold that these defenses were irrevocably waived but instead permitted the pleading of the defenses over Zenith's objection that they were "too late," and then erroneously concluded that they could not bar any part of Zenith's recovery. The trial court clearly had the power to permit the pleading of these defenses at any time prior to entry of judgment, and by granting HRI's motion the court relieved whatever waiver may otherwise have been created by the failure to plead these defenses earlier.

II. The Court of Appeals Had Authority to Rule on the Defenses and to Remand to the Trial Court for Further Hearings.

This Court held that the Court of Appeals had erred in holding that Zenith had not proved the fact of damage as to Canada. In so holding, the Court noted that the Court of Appeals had decided only that issue and had not passed upon such other issues as release, limitations, and the *amount* of recoverable damages. The remand to the Court of Appeals was "for further proceedings consistent with this opinion" and the Court of Appeals therefore had the power and duty to consider the remaining undecided issues.

Nothing the Court of Appeals did on remand is in any way inconsistent with the decision of this Court. Having concluded on remand that the affirmative defenses barred the recovery of that part of the original damage award which was based upon conduct of the Canadian pool before the releases and before the limitations period, the Court of Appeals properly remanded the case for further proceedings to give effect to those defenses. It is essential to have such further proceedings because *there are no trial court findings* as to the amount of damages flowing from damage period conduct, and there is no evidence in the record on which such findings could be made.

The proceedings ordered by the Court of Appeals do not require "a complete new trial" but even if they were to be so construed they would clearly be within the authority of the Court of Appeals. The decision of the Court of Appeals to remand for further proceedings in the trial court was not because the trial court had committed an abuse of discretion but rather because the trial court had committed errors of law in failing to apply properly the defenses of release and limitations to the amount of Zenith's recoverable damages.

III. Zenith's Argument that the Decision of the Court Below Is Contrary to Bigelow v. RKO Radio Pictures Is Without Any Basis.

The Court of Appeals' opinion in no way questioned the use of reasonable estimates as to amount of damage, or increased the standards of proof required under the *Bigelow* case. In fact the Court of Appeals expressly recognized the appropriateness of the use of reasonable estimates, but pointed out, as this Court had done, that the damage estimates given by Zenith's witnesses as well as the findings and original award by the trial court as to the amount of

damages, were based upon the assumption that Zenith was entitled to recover damages caused by pre-release and pre-damage period conduct. To accept Zenith's argument would require a holding that *Bigelow* somehow nullifies the statute of limitations and the law of settlement and release.

The opinion of the Court of Appeals clearly enables Zenith to recover the difference between the profits it actually made and those it would have made if, during the damage period, it had been a free competitor. All that this decision would require is a determination of the market share and profits which Zenith would have had in the period from May 22, 1959 to May 22, 1963, assuming Zenith entered that period with its actual Canadian market share and assuming that the pool was out of existence during the damage period.

IV. There Is No Merit in Zenith's Insinuations of Prejudice or Its Assertions that the "Public Interest" Requires that the Entire Original Award of $18,892,173 Be Reinstated.

Zenith's insinuations that the Court of Appeals (including specifically Judge Cummings) is prejudiced and that its decision "destroys" Zenith's right to recover treble damages and makes the recovery of damages under the antitrust laws "impossible in the Seventh Circuit" are wholly unwarranted. The Court of Appeals in remanding the case has specifically provided that Zenith may recover damages.

Similarly without merit is Zenith's argument that the "public interest" requires that the Court ignore the defenses of release and limitations and bestow upon Zenith the entire $18,892,173 originally awarded, including possibly millions of dollars necessarily based on pre-release and pre-damage period conduct. Zenith, a giant in its industry, has already demonstrated an eagerness to receive

millions of dollars in "treble damages" without legal right (*i.e.*, its claim to some $30 million in treble damages as to England and Australia as to which the Court of Appeals and this Court held no damage had been proved). No "public policy" requires that the statute of limitations or releases given for valuable consideration should be ignored in this case. Indeed, the Court of Appeals' remand decision comports in every respect with public policy under the anti-trust laws. It in no way interferes with Zenith's right to receive damages to which it is lawfully entitled, while at the same time it implements the statute of limitations as a statute of repose, and preserves the integrity of the general releases executed by Zenith in 1957 in return for a substantial consideration.

ARGUMENT

I. THE COURT OF APPEALS WAS CORRECT IN HOLDING THAT THE DAMAGE AWARD SHOULD EXCLUDE DAMAGES RESULTING FROM CONDUCT OF THE CANADIAN POOL WHICH OCCURRED PRIOR TO THE RELEASES OR PRIOR TO THE LIMITATIONS PERIOD.

A. A Substantial but as yet Undetermined Part of the Damages Awarded Is Based Solely on Pool Conduct Which Took Place Prior to the Releases or Prior to the Limitations Period.

The significance of the release and limitations defenses cannot be fully understood without consideration of the record concerning the original award, which shows that a major portion of the amount awarded as to Canada was based solely upon "pre-damage period" (May 22, 1959-May 22, 1963) conduct and "pre-release" (September 27, 1957) conduct.

In its opinion this Court pointed out that:

> "Damages were awarded on the assumption that Zenith, absent the conspiracy, would have had 16% of the Canadian television market *on May 22, 1959, and throughout the damage period* rather than its actual 3% share. *Since the failure to have 16% of the market on the first day of the damage period was ascribed to pool operations, those operations must have occurred prior to May 22, 1959. Some part of the damages awarded, therefore, necessarily resulted from pre-damage period conduct*" (AA. 16; 395 U.S. at 116-17).

Since Zenith claimed that its beginning market as to television was less than one-fifth of what it would have been but for the pool's conduct (*i.e.*, it was 3% instead of 16%), a very substantial part of the claimed damages "necessarily resulted from pre-damage period conduct." Similarly, as to radio, Zenith claimed that its beginning share should have been about 13% rather than its actual share of about 4% (DX 220, A. 2661).

This Court also pointed out that:

> "It could also rationally be found from the evidence that Zenith, beginning in 1958 [*i.e.*, following the September 1957 settlement], could not have reached its maximum potential by May 22, 1959 . . ." (AA. 18; 395 U.S. at 118-19).

Thus, the amount of damages awarded for the period May 22, 1959 to May 22, 1963, included damages caused by activities of the pool which took place not only prior to the limitations period but also prior to September 27, 1957, the date of the release.[9]

The record amply demonstrates the correctness of these conclusions. Although Zenith represented by its counter-

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[9] The record shows that Zenith entered the Canadian market in 1958, following the September 1957 settlement and releases in the RCA-Zenith litigation (*e.g.*, A. 450; Finding XXX, A. 2905).

claim and supporting papers that it was not seeking to recover for acts prior to April 7, 1960 (see pp. 3-4, *supra*; pp. 42-43, *infra*), that pleading was quietly abandoned by Zenith's use of Defendant's Exhibit 220 (A. 2661-64) as the basis for computing damages.[10] That exhibit was prepared on the "mature" or "established" market theory and assumed that from the very start of the damage period, and in every part thereof, Zenith would have had exactly the same share of the Canadian market as it had of the United States market (DX 220, A. 2661-64). Zenith had been in the United States radio market since the 1920's (A. 3468) and had entered the United States television market in 1948 at its beginning (A. 3495). It had achieved its 16% share of the U.S. television market (and 13% of the radio market, A. 2661) as a result of having been in the market and building up its share over a period of many years. Thus, the theory underlying DX 220 was that Zenith was entitled to compute its damages for the period 1959-1963 as if it had been in the Canadian market since the 1920's as to radio and 1948 as to television, unhampered by pool conduct.

During the proceedings following entry of the original findings, the trial judge confirmed that his understanding was that the basis for estimating the amount of damages as to Canada was that "there would have been an established market but for the pool" (A. 3204). And the Zenith executives, Wright and Kaplan, who were recalled to explain their prior damage estimates as to England and Australia (see AA. 16 n. 12; 395 U.S. at 117 n. 12), testified that *as to Canada* the claimed market percentage on which

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[10] DX 220 is reproduced facing page 23 of HRI's Brief in No. 49, October Term, 1968. Apparently for convenience in computation this exhibit used a four-year period beginning June 1, 1959 rather than May 22, 1959, the actual beginning of the four-year damage period preceding the date of the counterclaim.

Zenith's damage calculation was based, was on the assumption that Zenith would have been in the Canadian market for many years prior to June 1, 1959, but for interference by the pool. Kaplan, for example, specifically said that an assumption underlying the damage calculation as to Canada was that Zenith "would have been doing business there for a *great many years* prior to the damage period" (A. 3465).[11] He also said that:

> "In Canada, our assumption was that we commenced the period starting June 1, 1959 as if we had had a *full-blown organization,* and *had enjoyed the benefits of doing business there for years prior to that date*" (A. 3440).

Wright similarly testified that Zenith's assumptions as concerns Canada included the assumption that on June 1, 1959, "but for the pool," Zenith would have had an established market in Canada, *i.e.,* it "would have had a going market there" (A. 3490).

Finally, although Zenith previously represented to this Court that "no one ever heard" of the established market theory until "respondents' present counsel injected it by way of motion to rehear the case",[12] Zenith has now ad-

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[11] Zenith now asserts that "there is no evidence that beginning four years prior to November 20, 1959 when the suit was started and in the intervening time up and until the beginning of the damage period Zenith absent the Pool could not have gained a mature market position. In fact every inference is that Zenith would have had ample time to do just that" (Z. Br. 35). In the first place, Zenith is barred from claiming damages resulting from conduct taking place prior to the damage period, or prior to the releases (pp. 22-42, *infra*). Second, there is no finding by the trial court, and no evidence which would support such a finding, that Zenith could have gained a mature market position in the period referred to by Zenith.

[12] Zenith Reply Brief in No. 49, October Term, 1968, p. 15.

mitted that its theory of recovery "assumed that absent the illegal conspiracy Zenith would have had a mature market position at the beginning of the damage period" (Z. Br. 25), and that "petitioner's damage exhibit" [DX 220] was based on the same assumption (Z. Br. 14).

B. The September 27, 1957 Releases Barred Recovery of Subsequent Damages Flowing from Pre-Release Conduct.

The releases in question were part of the settlement of prior litigation between Zenith and its subsidiary on the one hand and RCA, General Electric and Western Electric on the other hand.[13] In that suit RCA had sued for patent infringement and Zenith had counterclaimed charging RCA and the other two companies, brought in as cross-defendants, with involvement in an alleged conspiracy by reason of participation in patent pools in Canada, England, and Australia, and asserting the right to recover treble damages (PX 38-42, A. 2697-2750).

In September 1957, the *RCA-Zenith* litigation was settled without trial (PX 43, 48, A. 2751-52, 2783-86). According to Zenith's counsel the value of the settlement to Zenith was approximately $45 million (AA. 171).[14] Pursuant to the settlement agreement, Zenith executed general releases

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[13] RCA v. The Rauland Corporation and Zenith Radio Corporation, Civil Action No. 48 C 1818 in the District Court for the Northern District of Illinois, Eastern Division (A. 2697).

[14] Under the settlement agreement (PX 48, A. 2783-86) Zenith received a cash payment of $10 million representing single damages for Canada only, Zenith having decided it had no appreciable damage claims as to England and Australia (A. 652, 656-57). In addition, Zenith was forgiven past royalties and received worldwide royalty-free licenses under radio and black and white television patents, bringing the total value of the settlement to Zenith (according to its counsel) to $45 million (AA. 171).

under date of September 27, 1957 which by their terms included future damages based on past acts (A. 3051-3052). There was no reservation of rights against third parties.

Zenith has repeatedly taken the position that its present counterclaim involves the same alleged conspiracy or conspiracies charged in the *RCA-Zenith* case.[15] In addition, it relied extensively upon the exhibits identified in the *RCA* case.[16]

Concerning the releases, the Court of Appeals held:

> "Since HRI was an unnamed joint tortfeasor, as admitted by Zenith at trial, with its co-conspirators in the

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[15] *E.g.*, Finding XIX (A. 2901), Finding XXII (A. 2901-02) and Finding XXX (A. 2905-06), which specifically mention the RCA litigation; Zenith's pre-trial and post-trial briefs on the anti-trust issues: "The *same* conspiracy was the subject of a private treble damage action in this court brought in the form of a counterclaim filed by Zenith in a patent infringement action, similar to this suit *R.C.A.* v. *Zenith and Rauland Corporation,* 48 C 1818" (A. 3070, pp. 30-31 of pre-trial brief); and statements by Zenith's counsel, McConnell: opening statement (A. 121-25); during trial (A. 159-60); and closing argument (A. 831-34, 839-40, 849-50, 857, 886).

[16] At least 72 of the exhibits which Zenith introduced in this case had been marked as deposition exhibits in the RCA case. *E.g.*, DX 111, A. 1557; DX 117, A. 1637; DX 162A, dated May 22, 1928, A. 2047; DX 162B, A. 2050; DX 162C, A. 2052; DX 162D, A. 2058, 2062-63, 2065 (5 different exhibits from the RCA case); DX 163, A. 2068; DX 164, A. 2070; DX 170, A. 2101; Defendant's Bulk Exhibit 179, A. 2152, 2157, 2159, 2161-63, 2165, 2167, 2170, 2174, 2175, 2177, 2180, 2182-83, 2185-86, 2188, 2190-91, 2193, 2196-97, 2202, 2204, 2207, 2210, 2212, 2215, 2217, 2221, 2224, 2226, 2229, 2233, 2235, 2244, 2246, 2249, 2251, 2253, 2256, 2261, 2268, 2270, 2275, 2277, 2279, 2283, 2287, 2291, 2293, 2295, 2298, 2301 (54 separate RCA case exhibits); DX 213, A. 2513; DX 214, A. 2519. See also DX 122, A. 1691; DX 135, A. 1870; and DX 157, A. 2027, which appear to have been deposition exhibits in that case.

> Canadian pool who were named in the *Rauland* case, and Zenith did not reserve its right against HRI, the releases given by Zenith clearly barred recovery from HRI of past, present and *future damages* flowing from any misconduct of HRI prior to the dates of the releases" (AA. 57) [Emphasis by the Court of Appeals].

The Court of Appeals was clearly correct in holding that: (1) the releases bar the recovery of future damages caused by acts which took place prior to the releases; and (2) HRI is entitled to the benefits of the releases.

1. The Releases Bar Recovery of Future Damages Caused by Conduct Which Took Place Prior to the Releases.

By the explicit terms of the releases, Zenith "released and forever discharged":

> ". . . all manner of action and actions, cause and causes of action [etc.] . . . damages [etc.] . . . claims and demands whatsoever, . . . which . . . Zenith . . . ever had, now has or . . . *hereafter can, shall or may have* for, upon or *by reason of any matter, cause or thing* whatsoever from the beginning of the world to the day of the *date of these presents* . . ." (A. 3051-52).

Thus, the releases expressly apply not only to damages up to the date of the releases but also to future damages resulting from conduct occurring prior to their execution. *Rotberg* v. *Dodwell & Co.*, 152 F.2d 100, 101 (2d Cir. 1945); *Sitchon* v. *American Export Lines, Inc.*, 113 F.2d 830, 831-33 (2d Cir. 1940), *cert. denied*, 311 U.S. 705 (1940); *Rice* v. *Trunkline Gas Co.*, 323 F.2d 394, 396-97 (7th Cir. 1963).

The question with respect to the legal effect of the releases here is whether Zenith on May 22, 1963, could have filed a suit and recovered from RCA, General Electric, Western Electric, or anyone else having the benefit of the

releases, that part of the damages awarded here which were caused by the activities of the pool which took place *prior* to the releases. The releases by their express terms foreclose such recovery (A. 3051-52), and Zenith has never denied this fact. Instead, Zenith argues that the effect of the Court of Appeals' holding is to *sanction a "future violation"* of the antitrust laws (Z. Br. 39) and to grant "HRI and the pool *immunity to operate forever* free from treble damage suits" (Z. Br. 41).

The Court of Appeals made no such holding, either expressly or impliedly. In fact, the effect of its holding is exactly the opposite. Rather than sanctioning "future violations," or giving HRI "a blank check to continue the pool" (Z. Br. 39), the Court of Appeals explicitly held that Zenith *is entitled to recover* for the damages resulting from damage period conduct (AA. 58-59).

The cases cited by Zenith, such as *Westmoreland Asbestos Co.* v. *Johns-Manville Corp.*, 39 F. Supp. 117, 119 (S.D.N.Y. 1941) and *Fox Midwest Theatres* v. *Means*, 221 F.2d 173, 180 (8th Cir. 1955) are inapposite. Nothing said in these cases even suggests that the releases here are contrary to the "public interest." Both of those cases state that it is against public policy to release "liability for *future violations* of the antitrust statutes" (221 F.2d at 180; 39 F. Supp. at 119). But the releases given by Zenith do not release liability for future violations but release only causes of action and damages which may result from conduct which took place prior to the release, and that is all the Court of Appeals held.

Nor is there anything in *Lawlor* v. *National Screen Service Corp.*, 349 U.S. 322 (1955) (see Z. Br. 39) which supports Zenith's position here. In that case this Court held that a 1943 dismissal with prejudice did not, under the

doctrine of *res judicata,* bar recovery of damages based on *conduct* which was *subsequent* to the 1943 dismissal, the Court there saying, as quoted by Zenith, that:

> "While the 1943 judgment precludes recovery on claims arising prior to its entry, it cannot be given the effect of extinguishing claims which did not even then exist and which could not possibly have been sued upon in the previous case" (349 U.S. at 328).

In reaching its decision in that case this Court noted that "[t]he *conduct* presently complained of was all subsequent to the 1943 judgment" (349 U.S. at 328). By the same token, the releases here only preclude recovery based on conduct prior to the releases and not damages based on subsequent conduct.

Aside from its contention that the releases somehow contravene public policy, the main basis for Zenith's release argument (as well as its limitations argument) is the erroneous contention that a treble damage cause of action does not accrue upon the occurrence of the illegal interference with the claimant's business which causes it to lose profits, but instead only accrues from day to day thereafter as the time passes when the claimant would otherwise have made the lost profits (Z. Br. 38). As we point out in discussing the limitations defense this contention is erroneous. A cause of action for present and future damages arises when wrongful conduct occurs having a damaging impact on the claimant (see discussion and citations, pp. 40-42, *infra*).

However, even if it were assumed that a cause of action for future lost profits had not accrued in 1957 when the releases were executed, the releases would nevertheless bar Zenith's claim for lack of market share and resulting loss of profits during the four-year damage period, to the

extent that the failure to have the claimed market share and profits resulted from pre-release conduct. The releases by their express terms release all "causes of action . . . damages . . . claims and demands" which Zenith "hereafter can, shall or may have for, upon or by reason of any matter, cause or thing whatsoever from the beginning of the world to the day of the date of these presents . . ." (A. 3051-52). Clearly, such future damages resulting from pre-release conduct were within the explicit language of the releases.

Under Zenith's theory, private treble damage plaintiffs under the antitrust laws would not be able to recover the loss of profits in the future as a result of injury inflicted to their business by illegal conduct prior to the commencement of the action, and the parties could never settle a claim for such future damages from past acts. The effect of Zenith's theory would be that, despite the unequivocal language of the releases, Zenith in 1963 could have sued any of the alleged co-conspirators, including RCA and the other companies specifically named in the releases, for the lack of market share caused by pre-release conduct, and for resulting loss of profits in the 1959-1963 period.

If it were the law that an antitrust claimant cannot include future damages from past conduct in a release he gives in settlement of an antitrust claim, the salutary benefits of settlements would be lost and the policy of the law to encourage settlements would be thwarted. The parties could not finally settle antitrust claims and the federal courts might well be flooded with actions by those plaintiffs who in the past years have settled treble damage cases, now claiming that damages incurred after the settlement as a result of pre-settlement conduct were not legally released and could be recovered in a new suit.

2. HRI Is Entitled to the Benefit of the Releases.

Zenith's brief does not expressly take the position that a release given to one co-conspirator, which reserves no rights against others, does not release other co-conspirators. Rather, Zenith's argument is directed to the specious proposition that the effect of the releases, as construed by the Court of Appeals, is to give immunity to future illegal conduct. That argument, with which we have already dealt (pp. 24-27, *supra*), does not go to the question of who is entitled to the benefit of the releases.

Of course, Zenith could hardly be heard to argue at this point in the litigation that HRI is not entitled to the benefit of the releases because it has already admitted during proceedings in the trial court that HRI *is* entitled to the benefit of the releases, and contended only that the releases did not apply to future damages.

> "The Court: What is your reply to his [HRI counsel's] contention that the 1957 release also released Hazeltine from anything prior to the date of the release?
>
> "Mr. McConnell [Zenith counsel]: Well, any money damages which had accrued prior to 1957, if they were joint tort feasor, which we allege that they were, would be released . . ." (A. 3035).

However, aside from this admission, the law is clear that HRI is entitled to the full benefit of these releases, including the release of future damages from past acts.

In deciding the release issue in this case, the Court of Appeals applied the modern rule set forth in the Restatement of Torts §885(1) (1939). That rule is that a party giving a release may reserve rights against others, but if as here, he does not do so, the release given to one alleged joint

tortfeasor releases all.[17] There is no disagreement among the circuits with respect to the applicability of this rule to antitrust cases. All courts of appeals faced with the question have held that the release of one alleged co-conspirator in an antitrust case releases all, in the absence of an express reservation of rights against others. In addition to the decision of the Seventh Circuit in the instant case, the Third, Fifth and Ninth Circuits reached the same results in *Dura Electric Lamp Co.* v. *Westinghouse Electric Corp.*, 249 F.2d 5, 6-7 (3d Cir. 1957); *Miami Parts and Spring, Inc.* v. *Champion Spark Plug Co.*, 402 F.2d 83, 84 (5th Cir. 1968); and *Twentieth Century-Fox Film Corp.* v. *Winchester Drive-In Theatre, Inc.*, 351 F.2d 925, 931 (9th Cir. 1965), *cert. denied*, 382 U.S. 1011 (1966). This rule has also been applied repeatedly by district courts.[18] Thus, there is no basis whatever for Zenith's assertions that the Court of Appeals "extend[ed] the common law rule as to releases" (Z. Br. 38).

In the *Twentieth Century-Fox* case, the Ninth Circuit very thoroughly considered the questions involved. Holding that the effect of a release in a federal antitrust case should be governed by federal law, the court concluded that the

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[17] The old common law rule was that rights against third parties could not be reserved in the release of a joint tortfeasor. See discussion of this rule in Twentieth Century-Fox Film Corp. v. Winchester Drive-In Theatre, Inc., 351 F.2d 925, 929, 931 (9th Cir. 1965), *cert. denied*, 382 U.S. 1011 (1966).

[18] California Concrete Pipe Co. v. American Pipe & Construction Co., 288 F. Supp. 823, 824-26 (C.D. Cal. 1968); Combined Bronx Amusements, Inc. v. Warner Bros. Pictures, Inc., 132 F. Supp. 921, 922 (S.D.N.Y. 1955); see also Canillas v. Joseph H. Carter, Inc., 280 F. Supp. 48, 53 (S.D.N.Y. 1968).

rule of the Restatement of Torts is the federal law on the question (351 F.2d at 929) and stated that:

> "Appellants . . . advance what apparently is the modern majority rule that joint tort-feasors are released *unless* an express contrary intention is demonstrated. Thus, as noted by appellees, the Supreme Court opinion in Aro Mfg. Co. v. Convertible Top Replacement Co., 377 U.S. 476, 84 S.Ct. 1526, 12 L.Ed. 2d 457 (1964), does repudiate the old rule, but, in doing so, it cites with approval the current Restatement position, . . ." (351 F.2d at 930-31) [emphasis supplied by the Court].

The court also noted the sound basis for the Restatement rule:

> "The Restatement rule does not prevent an injured party from reserving rights against one or more joint tort-feasors while releasing others. It merely requires that he announce his intent, and express that reservation in the release agreement. . . . We find it difficult to believe that the incorporation in a release of a clear statement of its scope and intent will place too heavy a burden on counsel charged with the responsibility of drafting the instrument" (351 F.2d at 930).

In the *Dura Electric Lamp* case, the Third Circuit had before it a release given to General Electric in substantially identical terms to the release involved here. What Judge Goodrich said for the court there is particularly applicable here:

> "It is to be noted that the language of the release is as general as language can be. There is nothing by which it may be interpreted as a covenant not to sue. There is nothing which even hints at a reservation of rights. There is nothing in the facts here which looks to a reexamination of the release based upon fraud or mutual mistake or anything of the sort. Michael Rose Productions v. Loew's, Inc., D.C.S.D.N.Y. 1956, 143

F. Supp. 606; McDermott v. Botwick, App. Div. 1956, 38 N.J. Super. 528, 119 A.2d 776. The transaction was one conducted between lawyers so we do not have an instance where a court may strive to extricate an uninformed layman from the consequences of a hasty settlement. As the court below said at the conclusion of the argument upon the motion for summary judgment, '[I]f there ever was [a] case * * * which seems to come within the confines of the general rule that release of one tort-feasor is a release to all, this is it.' That is our view also" (249 F.2d at 7).

There is nothing in *Mercoid Corp.* v. *Mid-Continent Invest. Co.*, 320 U.S. 661 (1944) or *Sola Electric Co.* v. *Jefferson Electric Co.*, 317 U.S. 173 (1942), either directly or by way of analogy, which would indicate that the releases should not benefit HRI.[19] Those cases stand for the proposition that federal law should control in deciding federally created rights or liabilities, and the Court of Appeals here applied the federal law as to the effect of the releases. Also, there is an important distinction between the type of relief sought in *Mercoid* and *Sola* and that sought by Zenith. In *Mercoid* and *Sola* the question was whether an estoppel could bar a party potentially aggrieved by an antitrust violation from asserting the illegality of the conduct. Application of the estoppel doctrine there would have permitted the continuation of possibly illegal conduct, leaving the victim no way to question it. Here, however, the Court of Appeals did not hold that the release would bar a suit either for injunctive relief or damages based upon a con-

[19] *Mercoid* held that a claim for damages and injunctive relief based on patent misuse was not barred by failure to plead misuse as a defense to an earlier infringement claim. *Sola* held that a patent licensee could contest the validity of the patent for the purpose of questioning the legality of a price fixing clause in the license.

tinuation of the alleged illegal conduct. On the contrary, the case was remanded so that the damages caused by damage period conduct could be determined.

Without actually arguing that the releases do not apply to HRI, Zenith attempts to condemn them by using the term "constructive release" and implies that somehow the established rules with respect to releases should not apply "in view of the public interest involved" (Z. Br. 39). There is no public interest requiring departure from the established federal rule that alleged joint tortfeasors are released unless a right against them is reserved. If Zenith had desired to exclude claims against third parties for past and future damages arising out of the past conduct of the alleged conspirators, it could have done so by a simple reservation in the releases given to RCA, General Electric and Western Electric. Zenith was represented by the same experienced counsel representing it in this litigation and gave unqualified releases completely without any reservation of rights against third parties (PX 48, A. 2783, 2786, A. 3049-53).

Moreover, Zenith's contention that the policy of the antitrust laws should be construed to foreclose a holding which gives the releases their recognized legal effect is particularly inapplicable under the circumstances of this case. Here Zenith has argued and the trial court has held that declarations of HRI's alleged co-conspirators were admissible against HRI (*e.g.*, A. 398-410) and that HRI as a co-conspirator was "legally liable for all the acts of the Pools and its members" in furtherance of the conspiracy (Conclusion of Law X, A. 2910, 2911). Since a co-conspirator is liable for the acts of his co-conspirators even if he himself performs no such acts, there is even more reason for applying the rule that a release given to his alleged co-conspirators which does not reserve any rights against him, also releases him.

In summary, the complete lack of merit in Zenith's position is highlighted by the fact that Zenith has already conceded that the releases do apply to HRI (p. 28, *supra*). The releases do not release claims based on *future violations of* law, but only future or residual damage which may result from *past conduct* occurring up to the "date of these presents" [September 27, 1957] (A. 3051-52). Zenith's "public interest" argument is nothing more than an attempt to repudiate the releases freely given in return for substantial consideration. As Zenith has admitted, the releases apply to HRI (and to RCA, GE, Western Electric and all other alleged joint tort-feasors) as to *past damages* suffered from pre-release conduct and there is no reason in public policy why the releases should not also apply to HRI (and to the other alleged joint tort-feasors) as to future damages resulting from pre-release conduct.

C. The Statute of Limitations Bars Recovery of Damages Flowing from Pre-Limitations Period Conduct.

In its prior opinion this Court said it was not passing on the question whether "damage period injury from pre-damage period conduct is recoverable" when the statute of limitations has been interposed as a defense (AA. 17 n. 13; 395 U.S. at 117 n. 13), so that on remand this question was left for decision by the Court of Appeals.

The Court of Appeals' holding on that question can be summarized as follows: The cause of action accrues and the statute of limitations starts to run from the damage-causing conduct. The statute of limitations is *not* a complete bar to Zenith's damage claim because there was illegal damage-causing pool conduct within the period of limitations. But the statute of limitations *does* bar that part of the amount of damages awarded which was caused by conduct of the pool prior to the limitations period. Accordingly,

the Court of Appeals concluded there should be a remand to the trial court to permit HRI to offer evidence "aimed at excluding from recovery damages flowing from pre-period 'damage-causing' acts, as well as an opportunity to introduce evidence to show that Zenith's damage flowing from 'damage-causing' acts within the period did not amount to $6,297,391" (AA. 60-61). This holding is consistent not only with the decisions of this Court but also the uniform decisions of the courts of appeals in other circuits.

As long ago as 1913 this Court said that no private action lies for a conspiracy unless it has a damaging impact on the claimant. *Nalle* v. *Oyster,* 230 U.S. 165, 182 (1913). The lower federal courts have uniformly followed that rule.[20] As the Ninth Circuit pointed out in *Suckow Borax Mines Consolidated, Inc.* v. *Borax Consolidated, Ltd.,* 185 F.2d 196, 208 (9th Cir. 1950), *cert. denied,* 340 U.S. 943 (1951):

> "[P]rivate civil antitrust actions are founded, not upon the mere existence of a conspiracy, but upon injuries which result from the commission of forbidden 'overt acts' by the conspirators. . . ."

Thus, the cause of action accrues and the statute of limitations starts to run upon the occurrence of the damage-

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[20] Momand v. Universal Film Exchs., Inc., 172 F.2d 37, 49 (1st Cir. 1948), *cert. denied,* 336 U.S. 967 (1949); Rutkin v. Reinfeld, 229 F.2d 248, 252 (2d Cir. 1956), *cert. denied,* 352 U.S. 844 (1956); Farbenfabriken Bayer, A. G. v. Sterling Drug, Inc., 153 F. Supp. 589, 593 (D.N.J. 1957), *aff'd,* 307 F.2d 210 (3d Cir. 1962), *cert. denied,* 372 U.S. 929 (1963); Crummer Co. v. duPont, 223 F.2d 238, 247-48 (5th Cir. 1955), *cert. denied,* 350 U.S. 848 (1955); Sherman v. Goerlich's, Inc., 238 F. Supp. 728, 730 (E.D. Mich. 1963), *aff'd per curiam,* 341 F.2d 988 (6th Cir. 1965), *cert. denied,* 382 U.S. 830 (1965); Garelick v. Goerlich's, Inc., 323 F.2d 854, 855-56 (6th Cir. 1963); Baldwin v. Loew's Inc., 312 F.2d 387, 390 (7th Cir. 1963).

causing illegal conduct. *Momand* v. *Universal Film Exchs., Inc.*, 172 F.2d 37, 49 (1st Cir. 1948), *cert. denied*, 336 U.S. 967 (1949); *Rutkin* v. *Reinfeld*, 229 F.2d 248, 252 (2d Cir. 1956), *cert. denied*, 352 U.S. 844 (1956); *Crummer Co.* v. *duPont*, 223 F.2d 238, 247-48 (5th Cir. 1955), *cert. denied*, 350 U.S. 848 (1955).

Nevertheless, Zenith argues that its cause of action for lost profits in this case did not accrue until the time passed during which Zenith would have otherwise made those profits and that a new cause of action arises each day additional profits are lost (Z. Br. 33).

If Zenith's position were the law, the purpose of the statute of limitations as a statute of repose would be defeated. For example, a claimant could wait ten, twenty or thirty years after the conduct which injured him had occurred and bring a cause of action for the loss of profits he had suffered during the preceding four years by contending that his profits during that period of time were not as large as they otherwise would have been but for the earlier conduct of the defendant. Application of Zenith's position here would mean that the statute of limitations is no bar to recovery of lost profits for the four year period beginning May 22, 1959, sustained as a result of conduct which took place as long ago as 30 years prior to the start of the limitations period. Yet that is exactly the result which would be produced because the damages at issue under the statute of limitations defense in this case are those representing profits lost by Zenith because pre-damage period pool conduct (going back to the 1920's) allegedly prevented it from building up its market share (pp. 4-5, 19-22, *supra*).

When faced with the contention made here by Zenith, the courts have repeatedly held that the statute runs from the time of the damage-causing conduct and that "[t]he period of limitations is not extended by the fact that damages from

that injury may have continued to accrue. . ." *Fleischer* v. *A.A.P., Inc.*, 180 F. Supp. 717, 723 (S.D.N.Y. 1959). See also *Baldwin* v. *Loew's Inc.*, 312 F.2d 387, 390-91 (7th Cir. 1963).

In *Farbenfabriken Bayer, A.G.* v. *Sterling Drug, Inc.*, 153 F. Supp. 589 (D. N.J. 1957), *aff'd*, 307 F.2d 210 (3d Cir. 1962), *cert. denied*, 372 U.S. 929 (1963), the court pointed out that:

> "The victim of the conspiracy may continue to suffer damage long after the last overt act has been committed, but, if he is to preserve his cause of action, he must commence suit within the period defined by the applicable [six-year] statute of limitations. . . .
>
> "The plaintiff contends that it seeks to recover only those damages which it has sustained within the six year period next preceding the commencement of the action. These damages are not recoverable in the absence of a specific allegation that they were proximately caused by an overt act committed within the same period" (153 F. Supp. 593).

Similarly, in *Crummer Co.* v. *duPont*, 223 F.2d 238, 247 (5th Cir.), *cert. denied*, 350 U.S. 848 (1955), the Court of Appeals for the Fifth Circuit held:

> "Thus, while successive claims would arise out of successive unlawful acts and consequent damages, such claims would have to do, and be concerned with only such successive occurrences and the damages and injuries caused by such acts, and such occurrences would not extend the period of limitation as to earlier acts done and injuries caused thereby."

Accord: *Momand* v. *Universal Film Exch., Inc.*, 43 F. Supp. 996, 1007 (D. Mass. 1942), *aff'd*, 172 F.2d 37 (1st Cir. 1948), *cert. denied*, 336 U.S. 967 (1949); *Park-In Theatres, Inc.* v. *Paramount-Richards Theatres, Inc.*, 90 F. Supp. 727,

729 (D. Del. 1950), *aff'd per curiam*, 185 F.2d 407 (3d Cir. 1950), *cert. denied*, 341 U.S. 950 (1951); *Laitram Corp.* v. *Deepsouth Packing Co.*, 279 F. Supp. 883, 888-89 (E.D. La. 1968).

Zenith's argument is based upon a misreading of *Foster & Kleiser Co.* v. *Special Site Sign Co.*, 85 F.2d 742, 750 (9th Cir. 1936), *cert. denied*, 299 U.S. 613 (1937), and of *Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.*, 392 U.S. 481 (1968) (Z. Br. 33-35).[21]

In the *Foster & Kleiser* case, the court did not hold that a new cause of action arises or that the statute begins to run each time further losses are suffered. When the Ninth Circuit said, "the cause of action arises when the damage is sustained and the statute of limitations begins to run at that time" (85 F.2d at 751), the court was referring to "damage" in the sense of an invasion of plaintiff's rights by illegal conduct of the defendant, not to each item of resulting damages or to each day during which the effects of that invasion may continue to be felt.

In fact, the interpretation which Zenith seeks to place on the *Foster & Kleiser* case was specifically rejected by the Ninth Circuit in its later decision in *Steiner* v. *Twentieth Century-Fox Film Corp.*, 232 F.2d 190, 194-95 (9th Cir. 1956). The plaintiff there contended that a number of cases cited, including the *Foster & Kleiser* case, should be construed "to mean that the statute of limitations runs not

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[21] Zenith's reliance upon *Radovich v. National Football League*, 352 U.S. 445 (1957) is similarly misplaced. Zenith cites that case as authority for the statement that the Court of Appeals' position is "completely untenable under the terms of the Clayton Act itself" (Z. Br. 32). In fact, the language quoted by Zenith had to do with the sufficiency of pleadings and had nothing whatsoever to do with the issues involved here.

from the overt act, but from the damages sustained" (232 F.2d at 195). However, the Ninth Circuit rejected this contention, saying:

> "We do not construe these cases to substantiate appellant's contention. These decisions merely hold that in order to start the running of the statute of limitations there must be damage occasioned by an overt act" (232 F.2d at 195).

Holding that the statute begins to run when "the blow which caused the damage was struck," the court pointed out that:

> "Any further internal injury affects the problem of how much should be claimed in damages, not the problem of when the statute of limitations commences to run" (232 F.2d at 195).

The error in Zenith's reading of the *Foster & Kleiser* case is in its assumption that the "damage is sustained" only when the period of time passes when plaintiff would otherwise have made the lost profits. Damage is "sustained" in virtually all types of actions when the injury takes place. For example, a plaintiff in a suit for physical injury to business property may not yet have expended the money to repair or replace his property or may not yet have lost the profits he will lose until his business property is restored, but he has nevertheless "sustained the damage" and his cause of action has accrued.

Zenith's argument as to *Foster & Kleiser* erroneously assumes that "damage" is the same thing as "damages." On the contrary:

> "The 'injury' referred to by the Act [15 U.S.C. § 15] means not 'damages' in the sense of the measure of recovery, but rather an act or occurrence which impairs the economic position of the plaintiff. If the loss of future profits or some other monetary loss is rendered

inevitable by such an act or occurrence, the wrong is complete, and the statutory period of limitations against suit then commences to run." *Emich Motors Corp.* v. *General Motors Corp.*, 1955 Trade Cas. ¶67,960 at p. 70,135 (N.D. Ill. 1955), *aff'd*, 229 F.2d 714 (7th Cir. 1956).[22]

The decision of this Court in *Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.*, 392 U.S. 481 (1968), neither decided nor discussed the question whether recovery could be had for activities occurring prior to the relevant damage period. Instead, the point being considered in footnote 15, from which Zenith quotes (Z. Br. 34-35), was whether an *initial* impact on Hanover in the year 1912, not sued on within the statutory period after that date, barred recovery on the current claim which was based on a continuation of United's illegal lease-only practice and the resulting impact on Hanover. This Court held that failure to sue within the limitations period after 1912 did not bar the recovery sought by Hanover (392 U.S. at 502), but the only recovery sought and permitted was on the basis of damaging impact flowing from rental payments which Hanover was forced to pay United during the damage period applicable in that case:

> "Our conclusion is that Hanover proved injury and the amount of its damages for the purposes of its treble-damage suit when it proved that United had overcharged it *during the damage period* and showed the amount of the overcharge . . ." (392 U.S. at 494).

The fact that the only damages awarded in *Hanover* were those caused by illegal conduct *within* the applicable damage period is shown by the statement from the Court of Appeals' opinion in *Hanover*, 377 F.2d 776 (3d Cir. 1967), part of

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[22] See also Analysis, CCH Trade Reg. Rep. ¶9141.

which Zenith itself (Z. Br. 35) quotes:

> "[W]here the repeated and measurable invasion of a plaintiff's rights occurs both outside the statutory period and also within it, the fact that some of the injury and damage occurred outside the statutory period does not affect the plaintiff's right to recover *for the separate invasion of its rights which occurred within the period*" (377 F.2d at 795).

Thus, the result reached by the Court of Appeals in this case is totally in accord with the result reached in the *Hanover* case.

The statute provides that any cause of action "shall be forever barred unless commenced within four years *after the cause of action accrued*" (15 U.S.C. §15 (b)). A cause of action "accrues" when the plaintiff has the right to sue; thus, to the extent that Zenith could have recovered the damages awarded here in a suit filed prior to May 22, 1959, its recovery of those damages is "forever barred" because the cause of action for those damages accrued more than four years prior to the commencement of Zenith's action.

Subject to the bar of the September 27, 1957 releases, prior to May 22, 1959 Zenith could not only have sued for the profits it had by then actually lost resulting from pool conduct during the preceding four years, but also the profits it would lose in the future by reason of the pool's interference with Zenith's market build-up during the preceding four years.[23] This fact was made abundantly clear in Judge Wyzanski's frequently cited opinion in *Momand* v. *Universal*

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[23] Since the September 1957 releases bar all recovery of damages flowing from pre-release conduct, the Court of Appeals' holding that damages should be limited to those caused by damage-period conduct relies upon the statute of limitations only to the extent of barring recovery based on pool conduct after the releases and before May 22, 1959, a period of less than two years (see AA. 57).

Film Exch., Inc., 43 F. Supp. 996 (D. Mass. 1942), *aff'd*, 172 F.2d 37 (1st Cir. 1948), *cert. denied*, 336 U.S. 967 (1949). In that case Judge Wyzanski pointed out that:

> "Each time the plaintiff's interest is invaded by an act of the defendants, he has a new cause of action. For that particular invasion he is at once entitled to recover as damages, *not only for the injuries he suffers at once, but also for those he will suffer in the future from that particular invasion,* including what he has suffered during and will suffer after the trial. Lawlor v. Loewe, 235 U.S. 522, 536, 35 S.Ct. 170, 59 L. Ed. 341" (43 F. Supp. at 1006).

As long ago as *Lawlor* v. *Loewe*, 235 U.S. 522, 536 (1915) this Court, through Mr. Justice Holmes, made it clear that in a private antitrust action the plaintiff can recover damages sustained subsequent to the action if such damages "were the consequence of acts done before and constituting part of the cause of action declared on." Accord: *A. C. Becken Co.* v. *Gemex Corp.*, 314 F.2d 839, 840 (7th Cir.), *cert. denied*, 375 U.S. 816 (1963) (Court of Appeals approved a treble damage award which included damages suffered by the plaintiff after the date of the filing of his suit but caused by conduct before the filing of the suit); *Independent Iron Works, Inc.* v. *United States Steel Corp.*, 322 F.2d 656, 673 (9th Cir. 1963), *cert. denied*, 375 U.S. 922 (1963); *Volasco Products Co.* v. *Lloyd A. Fry Roofing Co.*, 308 F.2d 383, 396 (6th Cir. 1962), *cert. denied*, 372 U.S. 907 (1963) (plaintiff held entitled to future damages "proximately caused by the wrongful and illegal acts committed by the defendant before the complaint was filed"); *Volasco Products Co.* v. *Lloyd A. Fry Roofing Co.*, 346 F.2d 661, 666 (6th Cir. 1965), *cert. denied*, 382 U.S. 904 (1965) (Court of Appeals affirmed a jury verdict which specifically attributed damages to loss of profits subsequent to the filing date of the complaint).

Since in a suit commenced prior to May 22, 1959, Zenith could have recovered the future expected profits lost by reason of the conduct of the pool during the four years prior to that date, the Court of Appeals was correct in holding that to the extent the damages awarded here included recovery for such profits lost by reason of conduct before the limitations' period, they were barred by the statute of limitations.

D. The Question of Tolling of the Statute of Limitations Is Not Before This Court.

Zenith asserts (Z. Br. 35-37) that the question is presented whether the four-year statute of limitations was tolled during the pendency of *United States* v. *General Electric, et al.* (Civil Action No. 140-157, S.D.N.Y.), in which Hazeltine Corporation was named as co-conspirator but not joined as a defendant. However, this question was not before the Court of Appeals and thus is not before this Court.

The specific ground on which the Court of Appeals rejected Zenith's tolling argument was that the issue was not before it since Zenith had not asserted tolling in the trial court. The issue was not presented to the trial court and was raised for the first time on appeal. The Court of Appeals also commented in *dictum* that under the most recent case in the circuit, tolling did not apply to a non-defendant in a government suit (AA. 59 n. 3).

The Court of Appeals' decision on this issue was clearly correct. Not only was the issue of tolling never presented until the appeal stage of this case, but any claim of tolling would be in *direct conflict* with the sworn representations and statement of Zenith's counsel in the trial court which formed the basis for the granting of leave to file the counterclaim.

Zenith's answer to HRI's patent infringement complaint was filed on April 7, 1960 (A. 1, 14-19). It alleged in paragraphs 12 and 13, domestic patent practices and patent pools in Canada and elsewhere, as misuse and "unclean hands" defenses, but asserted no counterclaim (A. 14-19). Approximately three years later on May 22, 1963, Zenith was granted leave to file and filed its counterclaim alleging, among other things, injury to its Canadian business (A. 2, 64-69).

In support of its motion for leave to file this counterclaim three years after the answer, Zenith filed the affidavit of Francis W. Crotty, a Zenith vice president and patent counsel, who was an attorney of record in this case (A. 63). In the affidavit Crotty represented to the Court that the "*matters* alleged in paragraphs 6-9 of defendant's counterclaim, to which this affidavit is attached, and *which are the proximate cause of damages alleged* and require the relief sought in said counterclaim, *occurred after the filing of the answer herein*" (A. 63, para. 2). A similar representation was made in Zenith's motion for leave to file, where Zenith counsel represented that the counterclaim arose out of the matters set forth in defendant's answer, "*and current related unlawful activities* of plaintiff occurring since the filing of the answer *which activities are the proximate cause of* present and continuing *damage* to defendant sustained after the filing of the answer" (A. 62). Thus, Zenith obtained leave to file its claim for damages on the basis of the express representation that it was only claiming damages resulting from alleged illegal activities occurring *after* April 7, 1960, the date Zenith filed its answer.

To rely upon tolling by reason of the pendency of government litigation the claimant should affirmatively allege the necessary facts as a part of the cause of action. See *Tague* v. *Balaban*, 146 F. Supp. 356, 358 (N.D. Ill. 1956); *National*

& Transcontinental Trading Corp. v. *International General Electric Co.*, 15 F.R.D. 379, 382 (S.D.N.Y. 1954).[24] Zenith's counsel well knew that tolling should be pleaded if it was to be relied upon. In the amended and supplemental counterclaim filed by Zenith in the RCA-Zenith litigation (PX 42, A. 2743-50), Zenith expressly set forth government litigation and alleged "tolling of the statute of limitations because of said Government suit" (A. 2746).

Zenith now argues that it did not plead tolling of the statute of limitations in the trial court "since recovery of damages was limited to the four-year statutory period" and since it had no duty to anticipate the statute of limitations defense raised by counsel for HRI (Z. Br. 36). Whatever the merits of these contentions in other circumstances, they certainly have no application here. For Zenith to have pleaded or relied on tolling, it would have been necessary to explain to the trial court why it chose to wait *over three years* after the filing of its answer to file its counterclaim for damages. Instead, the Crotty affidavit and Zenith's motion (A. 62, 63) affirmatively represented to the trial court that the damages sought in the counterclaim were to be compensation for the effects of injurious conduct *allegedly* committed *after* April 7, 1960. Any attempt to rely on pre-damage period conduct on the ground of tolling of the statute of limitations, would have been in *direct conflict* with Zenith's representations regard-

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[24] The rule here is analogous to the requirement that "fraudulent concealment" must be pleaded if it is to be relied on as tolling the statute of limitations. Moviecolor Ltd. v. Eastman Kodak Co., 288 F.2d 80, 88 (2d Cir. 1961), *cert. denied*, 368 U.S. 821 (1961); Kansas City v. Federal Pacific Electric Co., 310 F.2d 271, 284 (8th Cir. 1962), *cert. denied*, 373 U.S. 914 (1963); and Picoult v. Ralston Purina Co., 1969 Trade Cas. ¶72,681, p. 86,432 (S.D.N.Y. 1969).

ing the scope of its damage claim, made and sworn to in order to obtain leave to file the counterclaim.[25]

This situation is analogous to *Moviecolor Ltd.* v. *Eastman Kodak Co.*, 288 F.2d 80 (2d Cir. 1961), *cert. denied*, 368 U.S. 821 (1961) where the Second Circuit held that plaintiff had not only failed to plead tolling based on "fraudulent concealment", but that it could not be subsequently pleaded because "the complaint not only does not allege concealment but *substantially negates it*" (288 F.2d at 88). Nothing could more "substantially negate" a claim of tolling and the right to rely on pre-damage period conduct as a basis for an award of damages than Zenith's sworn representation to the court that its claim for damages was based on "matters ... which ... occurred *after* the filing of the answer herein" [April 7, 1960] (A. 63).

Even if tolling had applied, it would not mean that the original award as to Canada should be reinstated. First, tolling has no effect whatsoever on the releases which limit Zenith's damages to those resulting from conduct after September 27, 1957 (pp. 22-33, *supra*). Secondly, tolling would enable Zenith to rely upon conduct going back only to November 24, 1954, four years prior to the commencement of the government's case against General Electric (PX 44, A. 2754). As was made clear both by the findings of fact adopted by the trial court and by the testimony of Zenith's

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[25] At page 35 of its brief Zenith says that "this Court indicated that the statute of limitations even if applicable would not run during the pendency of the instant suit and that the counterclaim would relate back to the filing of the instant suit . . ." (Z. Br. 35). Zenith does not cite any place in this Court's opinion, but apparently has reference to the statement in footnote 2 (AA. 8; 395 U.S. at 108). However, the Court did not there "indicate" that there *would be* a relation back but instead said that "*no argument was made that the counterclaim*, in whole or in part, *related back* to an earlier pleading. . . ." In fact Zenith could not have relied upon relation back here because to do so would have been in direct conflict with its sworn representation.

witnesses, the damage awarded was based upon an assumed ability to collect for the effects of pool conduct going back long prior to November 1954—in fact, back to the 1920's (see pp. 4-5, 18-22, *supra*).

Since the basis for the Court of Appeals' decision on tolling was that the issue was not properly before it, the issue of tolling as to non-government defendants is not before this Court. Nevertheless, we will set forth briefly the factors which we believe indicate there is no tolling as to persons not named as defendants in a government case.

Neither *Minnesota Mining & Mfg. Co.* v. *New Jersey Wood Co.*, 381 U.S. 311 (1965), nor *Leh* v. *General Petroleum Corp.*, 382 U.S. 54 (1965) holds that the statute of limitations is tolled as to non-defendants in the government case. That question was not before the Court in either case. In *Minnesota Mining* the question was whether a Federal Trade Commission proceeding was the type of proceeding which would toll the statute of limitations. In *Leh* the issue was whether the conspiracy charged in the private suit was based "in whole or in part" on that charged in the government action.

In a long line of decisions prior to the *Minnesota Mining* and *Leh* cases, the lower federal courts consistently held that there was no tolling with respect to private treble damage defendants who were not defendants in the government action.[26]

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[26] Sun Theatre Corp. v. RKO Radio Pictures, Inc., 213 F.2d 284, 292 (7th Cir. 1954); Momand v. Universal Film Exch., Inc., 43 F. Supp. 996, 1011 (D. Mass. 1942), *aff'd*, 172 F.2d 37, 48 (1st Cir. 1948), *cert. denied*, 336 U.S. 967 (1949); Charles Rubenstein, Inc. v. Columbia Pictures Corp., 176 F. Supp. 527, 536 (D. Minn. 1959), *aff'd*, 289 F.2d 418 (8th Cir. 1961); Court Degraw Theatre, Inc. v. Loew's Inc., 172 F. Supp. 198, 200 (E.D.N.Y. 1959); Charles Rubenstein, Inc. v. Columbia Pictures Corp., 154 F. Supp. 216, 218-19 (D. Minn. 1957); Electric Theatre Co. v. Twentieth-Century Fox Film Corp., 113 F. Supp. 937, 945 (W.D. Mo. 1953); Levy v. Paramount Pictures, Inc., 104 F. Supp. 787, 789 (N.D. Cal. 1952); Christensen v. Paramount Pictures, Inc., 95 F. Supp. 446, 455 (D. Utah 1951).

Contrary to the suggestions in Zenith's brief (Z. Br. 37) and in the Third and Eighth Circuit cases which Zenith cites,[27] it is not true that all decisions prior to *Minnesota Mining* and *Leh* relied upon the estoppel concept. Many courts grounded their refusal to toll the statute of limitations upon the plain meaning of the language of the act. See *Momand* v. *Universal Film Exch., Inc.*, 43 F.Supp. 996, 1011 (D. Mass. 1942), *aff'd*, 172 F.2d 37, 48 (1st Cir. 1948); *Electric Theatre Co.* v. *Twentieth Century-Fox Film Corp.*, 113 F.Supp. 937, 945 (W.D. Mo. 1953); *Christensen* v. *Paramount Pictures, Inc.*, 95 F.Supp. 446, 454-55 (D. Utah 1951). See also, *Union Carbide Corp.* v. *Nisley*, 300 F.2d 561, 570-71 (10th Cir. 1962), *appeal dismissed*, 371 U.S. 801 (1962). In the *Union Carbide* case, after recognizing that the tolling provisions of Section 5(b) are *not* "confined to or governed by the evidentiary rules of estoppel" applicable to Section 5(a), the Tenth Circuit concluded that tolling ceased as to any particular named defendant upon that defendant's dismissal from the government proceeding (300 F.2d at 570, 571).

Zenith seeks to brush aside the Seventh Circuit's decision in *Sun Theatre Corp.* v. *RKO Radio Pictures, Inc.*, 213 F.2d 284 (7th Cir. 1954) and presumably other cases on the ground that those cases were decided before Section 5 of the Clayton Act was amended in 1955 (Z. Br. 37). However, the only inference which can be drawn from the legislative history of the amendment is that no change in the existing law (that tolling was not applicable to Government non-defendants) was intended. The House Judiciary Committee Report[28] concerning the 1955 amendment set forth

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[27] Hardy Salt Co. v. State of Illinois, 377 F.2d 768 (8th Cir. 1967), *cert. denied*, 389 U.S. 912 (1967); State of New Jersey v. Morton Salt Co., 387 F.2d 94 (3d Cir. 1967), *cert. denied*, 391 U.S. 967 (1968).

[28] H. R. Rep. No. 422, 84th Cong., Ist Sess. (1955).

and discussed its purposes, namely, to permit the government to sue for single damages, to provide a uniform four-year statute of limitations and to provide for tolling of the statute of limitations during the pendency of the government litigation and for one year thereafter. (The then existing statute provided for tolling only during pendency of the litigation.) No change was made in the existing language requiring that in order for tolling to apply, the private suit must be "based in whole or in part on any matter complained of" in the government proceeding. This language had been universally interpreted by the courts to apply tolling only as against parties who were in the government litigation.[29] Further, there is nothing in the report indicating any purpose to extend tolling to any party other than defendants in the government litigation.

While the legislative history concerning the Clayton Act of 1914 contains very little material on the tolling provision, House Report No. 627, 63d Cong., 2d Sess. (1914) at p. 14, referring to what is now Section 5(b), confirms that the intent was that the statute apply only to those who were defendants in the government litigation:

> "This section also provides that the statutes of limitations shall be suspended in favor of private litigants who have sustained damage to their property or business by the wrongful acts *of the defendant* during the pendency of the suit or proceeding instituted by or on behalf of the United States."

If this Court decides, contrary to our contention, to consider the tolling issue asserted by Zenith, the sole question before this Court would be: What did Congress intend?

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[29] In fact, the House Judiciary Committee Report on the 1955 amendments, in discussing the subject of limitations, referred to two of the cases, Momand v. Universal Film Exch., Inc., 43 F. Supp. 996 (D.C. Mass. 1942) and Christensen v. Paramount Pictures, Inc., 95 F. Supp. 446 (D.C. Utah 1951), which had construed the statute to *limit* tolling to parties named in the government litigation; H.R. Rep. No. 422, 84th Cong., 1st Sess. 7, 9 (1955).

We respectfully submit that when Congress amended the section in 1955 but did not change the language that had been uniformly interpreted as limiting tolling to parties to the government litigation, there is no basis to conclude that Congress intended to extend tolling to persons who were not defendants in the government litigation.

Zenith raises the issue of "tolling" in an attempt to save a damage award which erroneously relied on pre-limitations period conduct. But tolling *could not* justify the award, because of the bar of the 1957 releases; and because the award is based in part on conduct going back to the 1920's; and because assertion of tolling would be a repudiation of Zenith's representation which formed the basis for leave to file the counterclaim in the first place.

E. The Court of Appeals Properly Ruled that the Affirmative Defenses Were In the Case.

In its opinion, this Court referred to the question whether the defenses of release and limitations were in fact in the case, pointing out that:

> "HRI's answer to Zenith's counterclaim did not plead a statute of limitations defense. However, in the course of proceedings after entry of the District Court's initial findings of fact and conclusions of law, but before judgment, the trial court granted the oral motion of HRI's new counsel for 'leave to file' defenses based on the statute of limitations and on the release given by Zenith pursuant to the 1957 settlement agreement. . . . The trial court, without further mention of these defenses, forthwith refused to set aside or amend the damage award as to Canada, thus *either* rejecting the statute of limitations defense *or* considering it to have been waived. . ." (AA. 17 n. 13; 395 U.S. at 117 n. 13).[30]

[30]Since the Court referred to both the defense of limitations and the defense of release in its statement that the trial court granted leave to file the defenses, the statement at the end of the above quotation concerning the limitations defense obviously applied to both defenses.

Noting that "[t]he parties have not argued the matter here," the Court said: "we make no further effort to penetrate the confusion surrounding this issue. . ." (AA. 17 n. 13; 395 U.S. at 117 n.13).

On remand, the matter *was* argued by the parties and the Court of Appeals decided that the trial court's failure to give effect to the defenses was on the ground that they had no merit, and not on the ground of waiver. Pointing out that the trial court had permitted the defenses to be filed over Zenith's objections that they had been waived, and then denied HRI's motion to dismiss based on the defenses, the Court of Appeals said:

> "It is our view that the court's ruling was not on the basis of waiver, but because the defenses on their merits did not bar Zenith's recovery" (AA. 56).

The court then proceeded to consider the defenses and ruled on their effect (see pp. 10-11, *supra*).

In its Petition for Certiorari, Zenith erroneously asserted that this Court's statement in footnote 13 (AA. 17; 395 U.S. at 117) "was a clear holding that the trial court had properly ruled that those affirmative defenses were not in the case" (Z. Pet. Cert. 11). Zenith has apparently abandoned this assertion, but instead argues (Z. Br. 41-45) that this Court should *now* hold that (1) the trial court held that the defenses were waived and by granting leave to file them did not relieve the waiver and (2) the trial court did not have the power after entry of findings to relieve any waiver of those defenses which may have been created by the failure to plead them with the reply to Zenith's counterclaim. There is no merit in either of Zenith's contentions.

1. By Granting Leave to File the Defenses Prior to Judgment the Trial Court Relieved Any Lateness In Filing.

Following entry of the findings but prior to entry of judgment, HRI's new counsel entered the case and filed a

written motion entitled "Motion for Withdrawal of Antitrust Findings and Conclusions and for Other Relief" (A. 2939-51). Among other things, this motion asserted that the damages awarded to Zenith by the findings were barred by the general releases and by the statute of limitations (A. 2939). On March 30, 31, and April 1, 1965, again before judgment, this motion was the subject of extensive oral argument in the trial court, and HRI's counsel there urged that all or part of Zenith's claim for damages was barred by the statute of limitations and the releases (*e.g.*, AA. 248). Zenith argued that the limitations defense had been waived by failure to plead it earlier and also that, in any event, neither the statute of limitations nor the release constituted a bar to any part of the damages claimed by Zenith in this case (*e.g.*, AA. 173, 187, 189, 250-51).

On April 1, 1965, at the conclusion of his argument in support of the broad motion for withdrawal of the antitrust findings and for other relief, HRI's counsel orally repeated the motion as to these defenses, again asking leave to file the affirmative defenses "as a formal pleading of release and statute of limitations" (AA. 250). The trial court clearly understood that by its motion HRI was "seeking to file these new pleadings" (AA. 250), and Zenith's counsel argued that the motion should be denied because "I think it's too late" (AA. 251). Nevertheless, the trial court granted the motion (AA. 251), and stated that the defenses should be filed "*nunc pro tunc*" as of April 1, *i.e.*, before entry of judgment (AA. 254). These pleas were thereafter filed (A. 3049-53), but HRI's motion to dismiss the counterclaim on the ground of these defenses (A. 3048) was denied by the trial court on April 2, 1965 (A. 3062) and a judgment was thereafter entered as to Canada on April 5, 1965 (A. 3078-80).

By ordering a "*nunc pro tunc*" filing, the trial court insured that the defenses would be pleaded as of a date before

the judgment was entered, thereby bringing the facts within the holding of *Emich Motors Corp.* v. *General Motors Corp.*, 229 F.2d 714, 717-18 (7th Cir. 1956) (which had been brought to the trial court's attention, AA. 240-41). In that case, the court pointed out that a waiver of an affirmative defense may be relieved if the defense is asserted "before judgment."

In fact, Zenith has previously admitted that the trial court granted leave to file the pleas, and then passed upon them on the merits. At page 16 of its reply brief in the original appeal to this Court (No. 49, October Term, 1968), Zenith said:

> "*The trial court permitted the filing of the pleas* as of a date a year after the trial (A. 3037), and *then promptly overruled the motion to dismiss* the counterclaim on these grounds (A. 3037)."

The defenses of release and limitations were not pleaded with HRI's answer to the counterclaim because they were not relevant to the cause of action pleaded by Zenith, which was represented by Zenith to claim damages only for matters which "occurred *after* the filing of the answer herein [April 7, 1960]" (A. 63). These defenses became applicable only after trial and findings which revealed that, contrary to the representations made in connection with obtaining leave to file the counterclaim (pp. 3-4, 42-44, *supra*), Zenith was actually claiming damages caused by acts occurring before the release and before the start of the limitations period (*e.g.*, Finding XXIX, A. 2905).

As a purported basis for its contention that the trial court held the defenses had been waived, Zenith refers to the trial court's *question* to HRI's counsel during oral argument, "You do agree that the statute of limitations can be waived. You agree to that, don't you?" (AA. 237), as though the trial court's mere question constituted a rul-

ing (Z. Br. 41). The transcript shows (AA. 240-41), however, that in specifically answering the court's question, HRI's counsel cited *Emich Motors Corp.* v. *General Motors Corp.*, 229 F.2d 714 (7th Cir. 1956), and pointed out that the *Emich* case held that the trial court may *relieve a party* from failure to make a timely pleading of an affirmative defense and that a party may, at the discretion of the trial court, be granted leave to plead the defense at any time before judgment.

Indeed, the fact that the trial judge granted HRI's motion for leave to file the defenses *after* he raised this question and heard HRI's response shows that the court did not hold that the defenses were irrevocably waived. If, as Zenith contends, the trial court held that the defenses were irrevocably waived, that court would have *denied* leave to file them when Zenith objected that the defenses were "too late" (AA. 251). See *Groninger* v. *Davison*, 364 F.2d 638, 639-40 (8th Cir. 1966) where the court, in rejecting an argument that a limitations defense had been waived, relied upon the fact that "leave to amend the answer [to assert such a defense] was expressly granted by the order of the District Court. . . ."

At page 44 of its brief Zenith asserts that the "district court permitted HRI leave to file the defenses . . . for 'the sake of the record' (AA. 164, 251)." This repeats an argument made by Zenith in its reply brief in support of its Petition for Certiorari where Zenith asserted that in granting HRI's motion "the District Court . . . was only permitting the defenses to be filed so that HRI could protect its record on appeal" (Z. Cert. Rep. Br. 2). This argument ignores the fact that the issues of release and limitations *already* appeared "on the record," having been previously presented in HRI's written motion (A. 2939-51), which specifically raised these issues and asked permission to plead them as affirmative defenses (A. 2951).

Moreover, contrary to the inference which might be drawn from Zenith's brief (Z. Br. 44), the trial judge did not say that he was granting leave to file the defenses "for the sake of record." That phrase was used by HRI's counsel in reasserting as oral motions the written motions previously filed. HRI's counsel there indicated that he was *making the motion* "for the sake of the record," not that he was asking that the defenses be filed "for the sake of the record" (AA. 250). The oral motion expressly stated that leave was sought to file these "affirmative defenses as a *formal pleading* of release and statute of limitations" (AA. 250), and the trial court clearly recognized that HRI was asking leave to file them as "new pleadings" (AA. 250). Thus, Zenith's assertion that the grant of leave to file the defenses was *not* a grant of leave but merely a means of putting the affirmative defenses on the record is specious on its face.

Zenith also argues that the trial court rejected the "only ground urged" by HRI in support of its motion to withdraw the findings and reopen the proofs as to Canada and that the denial of that motion was necessarily a holding that the defenses were waived (Z. Br. 44-45). Zenith ignores the fact that HRI raised a number of grounds in support of its motion, including the fact that as a matter of equity and justice HRI should have an opportunity to plead the affirmative defenses, and to assert the governmental embargoes in England and Australia (A. 2949-50; AA. 247-49). That the trial court recognized that considerations of equity and justice applied is shown by the fact that it permitted HRI to assert the English and Australian governmental embargoes as a defense to the damage claims in those countries after "proofs [had been] closed" and "findings [had] been made," and permitted hearings after which it reduced the damages awarded as to England and Australia by cutting them approximately in half (A. 3037-38, 3202-06, 3524-26, 3534-35, 3537).

Indeed, everything that Zenith has argued here as indicating that the trial court held that the statute of limitations and release defenses had been waived (Z. Br. 41-45) was equally applicable to the embargo defenses. The trial court granted leave to HRI to prove the existence and effect of the embargoes and to plead the defenses of release and limitations—all after the proofs had been closed and the findings had been made (A. 3037-38). However, unlike its conclusion with regard to the embargoes, the trial court erroneously concluded that the defenses of statute of limitations and release could not bar any part of the recovery.

2. The Trial Court Had the Power to Relieve Any Late Filing of the Affirmative Defenses by Granting Leave to Plead Them Before Entry of Judgment.

Zenith's argument that affirmative defenses neither pleaded under Fed. R. Civ. P. 8(c), nor asserted by a motion under Fed. R. Civ. P. 12(b) are waived and that the waiver "is *final*" if not corrected "either prior to trial or during trial . . ." (Z. Br. 42) is also without merit. The effect of Zenith's argument is that a trial court is without power to permit the plea of an affirmative defense at any time after the trial even though judgment has not yet been entered. This argument ignores completely the fact that a waiver of defenses under Fed. R. Civ. P. 12(h) and 8(c) is "not final" and may be "relieved" and that Fed. R. Civ. P. 15(a) provides that leave to amend "shall be freely given when justice so requires." *Emich Motors Corp.* v. *General Motors Corp.*, 229 F.2d 714, 717-18 (7th Cir. 1956). Quoting from a decision of this Court, the court in *Emich Motors* stated that:

> "It is well settled that . . . a defendant who desires to avail himself of a statute of limitation as a defense must raise the question either in the pleading, or on the trial, *or before judgment*" (229 F.2d at 717).

See also *Alvado* v. *General Motors Corp.*, 194 F.Supp. 314,

316 (S.D.N.Y. 1961), *aff'd*, 303 F.2d 718 (2d Cir. 1962), *cert. denied*, 371 U.S. 925 (1962); *Groninger* v. *Davison*, 364 F.2d 638, 640 (8th Cir. 1966).[31]

The principal case Zenith cites (Z. Br. 42) for the proposition that the trial court could not relieve the late filing is *Systems Inc.* v. *Bridge Electronics Co.*, 335 F.2d 465, 466 (3d Cir. 1964). There the defense was raised for the first time on appeal. There was no issue whether the trial court could have granted leave to the defendant to plead the defense before judgment.

In *Wagner* v. *Fawcett Publications*, 307 F.2d 409, 412 (7th Cir. 1962), *cert. denied*, 372 U.S. 909 (1963) (cited Z. Br. 43), the district court on its own motion had dismissed the complaint on the grounds of the statute of limitations after one defendant had withdrawn the defense and the other never raised it, and the Court of Appeals held it error for the trial court to raise and apply the statute of limitations *sua sponte*.

The other cases cited by Zenith (Z. Br. 43) are similarly inapposite. For example, in *Roe* v. *Sears, Roebuck & Co.*, 132 F.2d 829, 832 (7th Cir. 1943), the Court said:

> "When defendant moved for summary judgment it had filed an answer, the legal effect of which was a waiver of its defense of the statute of limitations. It could not, therefore, *unless relieved from its default*, revive the defense it had waived. We need not consider when a defendant may be excused from its failure to plead the statute of limitations, and be permitted to amend its answer, because the instant case presents no such question. The defendant herein sought no such relief."

Both *Tornello* v. *Deligiannis Bros.*, 180 F.2d 553 (7th Cir. 1950) and *Oedekerk* v. *Muncie Gear Works*, 179 F.2d 821

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[31] And see Marconi Wireless Co. v. United States, 320 U.S. 1, 47-48 (1943) as to the broad powers of trial courts to reopen a case at any time before judgment.

(7th Cir. 1950), apparently involved attempts to raise affirmative defenses for the first time on appeal. The *Oedekerk* case was specifically distinguished on that ground in the *Emich Motors* case (see 229 F.2d at 717).

The amendment to pleadings has always been considered a matter within the discretion of the trial court. The decisions of the lower federal courts and this Court indicate that (1) the rule that "leave shall be freely given when justice so requires" is to be "heeded" and (2) the grant or denial of the opportunity to amend is a matter within the discretion of the trial court which in the absence of an abuse of discretion should not be disturbed. *Foman* v. *Davis*, 371 U.S. 178, 182 (1962).[32]

II. THE COURT OF APPEALS WAS CORRECT IN RULING ON THE DEFENSES AND IN REMANDING TO THE TRIAL COURT FOR FURTHER HEARINGS.

A. Since This Court Decided Only the Fact of Damage Issue, the Issues of Release, Limitations and Amount of Recoverable Damage Were Before the Court of Appeals.

The principal thrust of Zenith's Petition for Certiorari was that the Court of Appeals had "disregarded the mandate of this Court and in effect reversed the decision of this Court" (Z. Pet. Cert. 2). Zenith's contentions were that this Court's opinion should be construed as having decided the issues of release, limitations and amount of recoverable damages, and that a Court of Appeals does not have the power to pass upon undecided issues unless specifically directed by this Court so to do (*e.g.*, Z. Pet. Cert. 8-9).

Although Zenith's brief largely abandons these asser-

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[32] Indeed, we believe it would have been an abuse of discretion to have denied leave under the circumstances of this case.

tions, some vestiges still appear. For example, Zenith cites *In re Potts,* 166 U.S. 263 (1897), stating the recognized principle that the lower court has no authority to pass on matters once decided by this Court (Z. Br. 27-28), and implies that this Court has held that "the damage award" of $18,892,173 should be sustained (Z. Br. 24).[33] Also, while Zenith's brief does not repeat the argument made in its Petition for Certiorari (Z. Pet. Cert. 8-9) that a lower court has no authority to pass on specific issues unless this Court expressly instructs it to do so, a vestige of that argument remains in Zenith's statements that "[t]his Court's opinion will be searched in vain to find any remanding order express or implied, for further consideration by the court below of the issues of limitations and release" (Z. Br. 31).

Although these contentions of lack of jurisdiction and authority appear now to be substantially abandoned, we believe it appropriate to point out briefly that this Court passed only upon the *fact* of damage issue.

In reviewing the decision of the Court of Appeals, this Court pointed out that HRI had raised a number of "major points" in the Court of Appeals but that in view of that court's "overriding judgment" that Zenith had not been injured by pool conduct, the other "major points" were never reached (AA. 13, 17; 395 U.S. at 113, 118).

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[33] Zenith's Questions Presented (No. 5, Z. Br. 4) conveys the impression that this Court approved the damage award of $18,892,173. Zenith there incorrectly quotes this Court as saying "that 'the record evidence is sufficient to support *the* finding of damage resulting from events occurring after the beginning of the damage period.'" In fact, the Court *said* that "the record evidence is sufficient to support *a* finding of damage . . ." (AA. 19; 395 U.S. at 119), and was clearly referring to the fact of damage and not to the amount of the award.

These other points included the defenses of statute of limitations and of release and the issue of the *amount* of recoverable damages (AA. 13; 395 U.S. at 113).

This Court pointed out specifically and repeatedly that the Court of Appeals had ruled only on the fact of damage issue, "[w]ithout reaching any of the other issues presented by the appeal on this phase of the case . . ." (AA. 7-8, 13; 395 U.S. at 107-08, 113).

As to Canada, this Court held that the Court of Appeals had erred in its conclusion that the "fact of damage" during the four-year period had not been proved, stating that although Zenith's evidence was "by no means conclusive," it "was sufficient to sustain the inference that Zenith had in fact been injured to some extent . . ." (AA. 14; 395 U.S. at 114). The Court made it clear that its decision was limited to the fact of damage issue and that its ruling did not cover the extent of the injury, *i.e.*, the amount of damage. In explaining its statement that Zenith had been injured *"to some extent"* the Court said:

> "Zenith's burden of proving the fact of damage under § 4 of the Clayton Act is satisfied by its proof of *some* [emphasis by this Court] damage flowing from the unlawful conspiracy; *inquiry beyond this minimum point goes only to the amount* and not the fact of damage" (AA. 14 n. 9; 395 U.S. at 114 n. 9).

The Court pointed out that the Court of Appeals had decided that there was no injury during the damage period to Zenith "from pool activities either *before* or *after* the beginning of the damage period" (AA. 13; 395 U.S. at 113). In reversing that decision, this Court concluded that the evidence warranted "the inference that CRPL's *past conduct* interfered with and made more difficult the distribution of Zenith products in 1959 and later years" (AA. 18; 395 U.S. at 118); and that "the record evidence is sufficient

to support a finding of damage resulting from events occurring *after* the beginning of the damage period" (AA. 19; 395 U.S. at 119).

The effect of these conclusions was that the trial court's finding of the fact of some damage was sustained, and that even if Zenith's right to a recovery for damages based on pre-damage period conduct was barred by limitations or by the September 27, 1957 releases, nevertheless Zenith could assert a claim to recovery to the extent that the damages suffered were due to damage period conduct. Thus it was not necessary for this Court to rule upon the applicability or effect of the defenses of limitations or release. On the other hand, it was appropriate for this Court to consider pre-damage period conduct on the fact of damage issue, because pre-damage period conduct could form the basis for additional recovery if the Court of Appeals should decide that the affirmative defenses had been waived or did not bar recovery based on pre-damage period conduct.

Since this Court decided only the "fact of damage" issue and remanded "for further proceedings consistent with this opinion" (AA. 40; 395 U.S. at 141), there can be no doubt that the Court of Appeals had the authority to consider and decide all remaining undecided issues. It has been the law, at least since *Ex parte French*, 91 U.S. 423 (1875), that when a case is reviewed by this Court or any other appellate court on a single issue and then remanded for further proceedings, the lower court has jurisdiction, indeed has the duty, to decide the remaining issues, and that an instruction to the court below to "proceed in conformity with the opinion" of the Court is all the instruction customary or required to authorize and direct the court below to pass upon the issues left open by this Court's decision (91 U.S.

at 426). See also *In re Sanford Fork & Tool Co.*, 160 U.S. 247, 256 (1895).[34]

The Court of Appeals' decision in no way attempts to question this Court's conclusion that the Court of Appeals had "*erred* in setting aside the District Court's decision with *respect to the fact of damage in Canada*" (AA. 14; 395 U.S. at 114). Instead, the Court of Appeals specifically recognized at the outset of its opinion that "[t]he Supreme Court reversed our decision with respect to the Canadian patent pool because *it concluded we erred* in our determination that Zenith had failed to prove *the 'fact' of damage in Canada*" (AA. 55). It then proceeded to a consideration of the remaining undecided issues, pointing out that:

> "These points had been raised before us by HRI in the first appeal, but we saw no need of passing on them in view of our reversal of the judgment for Zenith" (AA. 55).

The issues considered by the Court of Appeals are those which this Court referred to in its opinion but did not de-

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[34] The cases since the *French* and *Sanford* cases have consistently held that the procedure employed by the Court of Appeals in this case is proper. See Sprague v. Ticonic National Bank, 307 U.S. 161, 168 (1939) (the lower court is free to decide remaining issues on remand); General Investment Co. v. Lake Shore & Michigan Southern Ry., 260 U.S. 261, 284-85 (1922) (reversal by an appellate court on single issue does not preclude consideration of other issues in lower court); Utah Pie Co. v. Continental Baking Co., 386 U.S. 685, 704 (1967), and following remand, Continental Baking Co. v. Utah Pie Co., 396 F.2d 161, 163, 195-96 (10th Cir. 1968), *cert. denied*, 393 U.S. 860 (1968) (after reversal by this Court on a single issue and remand "for further proceedings," the Court of Appeals decided the remaining issues and remanded for a new trial; Utah Pie petitioned for a writ of certiorari, contending that the action of the Tenth Circuit was in conflict with this Court's decision on the single issue, and this Court denied certiorari).

cide (pp. 8-9, *supra*), *i.e.* (a) the applicability of the affirmative defenses; (b) effect of the releases; (c) effect of the statute of limitations; and (d) the amount of recoverable damages in light of those defenses. Thus, the Court of Appeals clearly had the authority to decide these issues after remand by this Court.

B. The Court of Appeals Had Authority to Order a Remand for Further Proceedings in the Trial Court.

Zenith argues that the further hearings ordered by the Court of Appeals are a "complete new trial on the Canadian damage issue" (Z. Br. 27) and that the Court of Appeals had no authority to order such hearings in the absence of a showing of an abuse of discretion by the trial court by a refusal to grant a new trial (Z. Br. 15, 26-27). In so arguing, Zenith incorrectly states the record and ignores the nature of the rulings made by the trial court and the Court of Appeals.

To begin with, HRI's motion to the trial court was not for a "new trial" but for a reopening of the proofs to permit further hearings and the taking of additional evidence before entry of judgment, the motion being based in part on the defenses of release and statute of limitations (A. 2939, 2951). The trial court was not exercising its discretion when it denied HRI's motion as to Canada; rather, it was ruling (erroneously) as a matter of law that the dedefenses of release and limitations could not bar any of the recovery (see pp. 22-42, *supra*).

Similarly, the decision of the Court of Appeals was not that, as a matter of discretion, the trial court should have granted a new trial. On the contrary, the Court of Appeals held that the trial court had committed errors of law (namely, the failure to give the proper effect to the statute of limitations and the release defenses) and that to correct those errors of law, the taking of additional evidence on

the issue of the amount of recoverable damages is necessary (AA. 56, 60-61).

Moreover, even if it could be said that the Court of Appeals had ordered a "new trial", there is no doubt that the Court of Appeals had the authority to do so upon its conclusion that legal errors had been committed by the trial court. This Court pointed out in *Neely* v. *Martin K. Eby Const. Co.*, 386 U.S. 317, 327-28 (1967), that "the courts of appeals regularly and characteristically must deal" with "issues of law" which "may entitle [a party] to a new trial;" and that these issues of law "are precisely the kind of issues that the losing defendant below may bring to the court of appeals without ever moving for a new trial in the district court." See also, *Ex parte French*, 91 U.S. 423, 426 (1875), in which this Court approved the action of the appellate court in providing for a new trial which was necessitated by a previous erroneous legal ruling, even though this Court had not ordered a new trial but merely directed proceedings "in conformity with this opinion."

In any event, the Court of Appeals has not ordered a new trial but rather has called for a determination *for the first time* of the amount of damages suffered by Zenith as the result of damage period conduct, a question *never previously considered* by the trial court, and as to which there are no findings. Since the amount of damages could not be determined on the basis of the present record (p. 11, *supra*), it was necessary for the matter to be remanded to the trial court for the taking of additional evidence to give effect to the defenses of release and limitations, and to determine the proper amount of the damage award.

Certainly, the remand order here was within the Court of Appeals' statutory authority to remand the cause and "require further proceedings to be had as may be just under the circumstances" (28 U.S.C. § 2106).

III. ZENITH'S ARGUMENT THAT THE DECISION OF THE COURT BELOW WAS CONTRARY TO *BIGELOW v. RKO RADIO PICTURES* IS WITHOUT ANY BASIS.

Zenith devotes a major portion of its brief to various arguments to the effect that the Court of Appeals' decision was in conflict with this Court's opinion in *Bigelow* v. *RKO Radio Pictures, Inc.*, 327 U.S. 251 (1946).

In the *Bigelow* case this Court stated certain rules of law, relative to proof of the amount of damages, having to do with the use of *estimates* where more precise proof is not available. Thus, this Court stated that the defendant may not object in case the plaintiff makes a "*reasonable estimate* of the cause of injury and of its amount, supported by the evidence" (327 U.S. at 265); that the defendant should not be heard to object because plaintiff's estimate is not based on "more accurate data which the wrongdoer's misconduct has rendered unavailable" (327 U.S. at 265); and also that while the trier of the facts may not render a decision based on speculation or guesswork, he may "make a just and reasonable estimate of the damage based on relevant data" (327 U.S. at 264). Of course, there is nothing in *Bigelow* on the statute of limitations or on the law of release.

Zenith lays down a barrage of charges asserting that the Court of Appeals "gave no deference . . . to the *Bigelow* case as a precedent" (Z. Br. 15); "reverses *Bigelow*" (Z. Br. 21); did not pay "any attention" to *Bigelow* (Z. Br. 22); and gave "no deference" to the trial court's findings (Z. Br. 29). It even goes to the extreme of asserting that the Court of Appeals' opinion "not only reverses *Bigelow* but would make proof of lost profits in the case of exclusion from a market utterly impossible" (Z. Br. 21) and "makes the recovery of treble damages under the anti-trust laws *impossible in the Seventh Circuit*" (Z. Br. 30).

The truth is that the Court of Appeals in no way questioned the use of estimates and in no way failed to follow the requirements of proof as laid down in *Bigelow* and the other decisions of this Court. The only thing the Court of Appeals decided was that, because of the statute of limitations and the releases, Zenith was not entitled to recover damages flowing from pre-release and pre-damage period conduct.

Contrary to Zenith's repeated assertions (*e.g.*, Z. Br. 15, 22, 28-29), the Court of Appeals did not rule that Zenith's damage proofs were "insufficient as a matter of law" and did not reverse any findings of fact of the trial court. In fact, the Court of Appeals expressly recognized that Zenith's evidence was competent evidence *prima facie* of the type which could serve as a basis for a damage approximation under the *Bigelow* case (AA. 59-60). But the trial court award could not be reinstated—not because it was improper to use estimates to prove the amount of damages in an antitrust case—but because, as this Court had previously pointed out (AA. 16; 395 U.S. at 116-17), the estimates of Zenith's witnesses (and the trial court's findings) *necessarily* included the damages caused by pre-damage period conduct. Thus, rather than reversing the trial court's finding, the Court of Appeals' decision would call for additional findings—as to the damages resulting solely from damage period conduct.

Zenith purports to find great significance in its repeated assertion that there was no "countervailing evidence" or objection to the estimates of Zenith's witnesses (Z. Br. 10, 14, 25, 26). Of course, the simple, dispositive answer to this assertion is that for the purposes of the issue before this Court and the issue decided by the Court of Appeals, even if there was no "countervailing evidence" (which there was),[35] the lack of such evidence would be immaterial. The

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[35] See pp. 127-134 of HRI's main brief in the Court of Appeals, dated December 21, 1966 and on file with the Clerk of this Court as part of the record on appeal.

point is that Zenith's damage evidence did not even purport to answer the proper question, that is, the loss of market and the resulting loss of profits *caused by the conduct of the Canadian pool during the damage period.* Rather, it *estimated the wrong thing,* namely, what Zenith's market share and profit would have been if Zenith had entered the four-year damage period with a mature market position (pp. 4-5, 18-22, *supra*).

Zenith's brief says the Court of Appeals would "place the burdens of uncertainty" on Zenith (Z. Br. 25), and implies that on the record the entire damage award might possibly be "attributable" solely to damage period conduct (Z. Br. 23-24, 30). *On the contrary, Zenith's own evidence and estimates establish affirmatively that a very substantial portion of the award is "necessarily" based on pre-damage period conduct and cannot be attributed to conduct during the damage period* (AA. 16; 395 U.S. 116-17; pp. 4-5, 18-22, *supra*).

The extent of Zenith's reliance on pre-damage period conduct is emphasized by the fact that Zenith's evidence and estimates assumed a mature market, several times greater than Zenith actually had (the estimates assumed a starting share of around 16% of the television market and 13% of the radio market rather than Zenith's actual starting shares of about 3% and 4%, respectively). The obvious way to segregate and determine the damages which are recoverable, *i.e.*, damages caused by damage-period conduct, is to determine what Zenith's market share should have been, absent the operation of the pool during the damage period, and starting with the share of the Canadian market which Zenith actually had at the beginning of the period.

In arguing that *Bigelow* requires that it be awarded the original Canadian judgment of $18,892,173 regardless of the fact that a substantial portion of the award is based on pre-damage period and pre-release conduct, Zenith is in

substance asserting that *Bigelow nullifies* the statute of limitations and the law of settlement and release. However, nothing in *Bigelow* or any of the other cases cited by Zenith suggests that this Court meant to abrogate the statute of limitations imposed by Congress, or to abrogate the settled law of release, and Zenith's brief cites no authority or reason that would support such a result.

Similarly without basis are Zenith's repeated assertions that the decision of the Court of Appeals limits Zenith's damages to those flowing from the June 5, 1959 letter from the Canadian pool (Z. Br. 4, 29) and that the Court of Appeals held that Zenith's damages "must be computed as allocated to particular overt acts" (Z. Br. 14, 20, 28). The Court of Appeals made no such rulings. It did refer to the June 5, 1959 letter as an illustration of damage-causing conduct, but made it clear on the face of its opinion that Zenith was entitled to recover all damages flowing from damage-causing conduct taking place within the period (AA. 58-61). Contrary to Zenith's assertion (Z. Br. 29), there is nothing in the Court of Appeals' opinion that is inconsistent with the recovery by Zenith of damages resulting from the Canadian pool's continued operations during the damage period. In fact, under the opinion of the Court of Appeals Zenith is clearly entitled to recover the difference between the profits it actually made and those it would have made if, during the damage period, it had been a free competitor (AA. 59).

Determining the amount of damages in this manner neither "destroys" Zenith's right to recover treble damages, as argued by Zenith (Z. Br. 26) nor makes the proof of lost profits "utterly impossible," as Zenith contends (Z. Br. 21). What the Court of Appeals' decision would require is a determination of the market share and the profits which Zenith would have achieved in the period from May 22, 1959 to May 22, 1963, starting with the share of the

Canadian market Zenith actually had at the beginning of the damage period and assuming that the pool was out of existence or not exercising any effect upon Zenith's operations during the damage period. Zenith cannot validly assert that estimating damages in this manner is impossible. This is exactly the procedure which Zenith's witnesses purported to have used in estimating damages for England and Australia. There, faced with the proof of the government embargoes barring Zenith's entry into these countries prior to the damage period, Zenith's witnesses claimed that their estimates as to what Zenith's market share would have been in England and Australia were made on the assumption that Zenith would have been starting as a new entry in the market (A. 3438-39, 3490). While these estimates were found by the trial court to involve exaggeration (A. 3525), Zenith's witnesses had no hesitancy to make such estimates.

Finally, far from placing the burden of uncertainty on Zenith (see Z. Br. 25), the Court of Appeals has held that on remand it is HRI who is to offer evidence "aimed at excluding from recovery damages flowing from pre-period 'damage-causing' acts" and "to show that Zenith's damage flowing from 'damage-causing' acts within the period did not amount to $6,297,391" (AA. 61). Zenith, of course, will be entitled to offer evidence on its behalf.

IV. THERE IS NO MERIT IN ZENITH'S INSINUATIONS OF PREJUDICE OR ITS ASSERTIONS THAT THE "PUBLIC INTEREST" REQUIRES THAT THE ENTIRE ORIGINAL AWARD OF $18,892,173 BE REINSTATED.

A. Zenith's Insinuation that It Has Been Denied Justice By a Prejudiced Court of Appeals Is Unwarranted.

Zenith's current brief omits the outrageous innuendo of its Petition for Mandamus (Z. Pet. Mand. 24) that "it is apparent from its two opinions that the court below is

going to find successive reasons for denying Zenith the treble damage recovery in this case." But it continues Zenith's basic pose as an embattled litigant being denied justice by a prejudiced Court of Appeals. For example, Zenith asserts that the Court of Appeals "limit[ed] the issues to be tried [on further hearings] in a manner that *destroys* petitioner's right to recover treble damages for its loss of profits in Canada during the damage period" (Z. Br. 26) and even goes so far as to assert that the decision of the court below "makes the recovery of treble damages under the antitrust laws impossible in the Seventh Circuit" (Z. Br. 30). Such assertions are totally unwarranted, for the Court of Appeals specifically held that Zenith could and should recover damages in this case.

Zenith again refers to its motion in the Court of Appeals to disqualify Judge Cummings and, without directly so stating, insinuates that the denial of this motion by the Court of Appeals and Judge Cummings' continued participation in this case was prejudicial (Z. Br. 11-12). It seems fair to question Zenith's motives in raising this matter at all, since it does not argue that this Court should reverse the denial of Zenith's motion or assert that the denial of the motion presents any question for review. In any event, the grounds cited by Zenith in its motion to disqualify Judge Cummings had no merit whatsoever and the motion was properly denied.

The alleged facts presented by Zenith's motion to disqualify Judge Cummings (AA. 48-51) relate to the counterclaim filed by Zenith and its subsidiary against RCA, Western Electric and General Electric more than 20 years ago (A. 2701-50) and terminated by settlement without trial over 12 years ago (A. 2751). Judge Cummings, then a practicing attorney in Chicago, was one of Western Electric's Chicago counsel in that litigation, and Zenith claims that Western Electric was a member of the Canadian patent pool (Z. Br. 11). Neither HRI nor Hazeltine Corpo-

ration was a party to that suit and Western Electric Company is not and never has been a party to this suit. None of the reasons for disqualification provided in 28 U.S.C. § 455 exists.

Moreover, the record shows that Zenith did not even claim to regard Judge Cummings as disqualified to sit in this case until one and one-half years after the first decision by the Court of Appeals, in which he participated without objection by Zenith. All the alleged facts relied on by Zenith in its motion were known to Zenith at the time this case was first argued orally in the Court of Appeals on May 18, 1967 before a panel composed of Judge Cummings and Judges Castle and Kiley. Yet at no time during the proceedings in the Court of Appeals following that argument or in its petition for rehearing following the decision by the Court of Appeals did Zenith challenge the qualifications of Judge Cummings to sit in this case. Nor did Zenith raise any question as to the qualifications of Judge Cummings in its Petition for Certiorari to this Court filed in March, 1968 or in any of its briefs to this Court in the previous appeal.

Furthermore, Zenith itself affirmatively requested Judge Cummings to continue to participate in the case when, on January 3, 1968, following the first decision of the Court of Appeals, Zenith filed "a petition for rehearing" requesting that "the case may be reheard by the entire Court *en banc*" (A. 4265, A. 10). There was no suggestion in that petition that Judge Cummings should disqualify himself or that he should not sit as one of the judges on the requested rehearing. On the contrary, Zenith specifically requested that the "entire Court" (which included Judge Cummings) should participate.

Zenith did not then regard Judge Cummings as disqualified and its motion seeking to disqualify him made after this Court's remand and over one and one-half years

after the initial decision of the Court of Appeals was clearly an afterthought.

In *Delaney* v. *United States*, 263 U.S. 586, 589 (1924), where a motion to disqualify a judge was not filed until after the matter had been decided against the moving party, the Court stated:

> ". . . yet it would seem that he [the movant] should not be permitted to assume the competency of the tribunal to decide for him and its incompetency to decide against him. His action certainly suggests the idea that it was an afterthought with him . . ."

In the instant case, not only did Zenith "assume the competency" of Judge Cummings to sit, but by its petition for rehearing *en banc* it *affirmatively* recognized that competency.

B. No "Public Interest" Requires that Zenith Be Awarded Any Damages to Which It Is Not Lawfully Entitled.

Zenith asserts that "the deterrent effect of an enforced treble damage judgment is necessary to serve 'the high purpose of the antitrust laws,'" (Z. Br. 20).[36] Since the Court of Appeals has recognized that Zenith has a right to

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[36] The utter sophistry of Zenith's contention that the entire $18,892,173 originally awarded by the trial court should be reinstated because third parties are "not subject to the injunction" (Z. Br. 20) is exposed by the fact that in the previous appeal Zenith argued that it was the *injunction* which it had to have to protect its business in Canada. In fact, it represented to this Court that as a result of the injunction (which continues in effect today) Zenith and other American companies had been able to export $14,538,417 worth of television and radio sets to Canada in 1967 (Zenith Brief in No. 49, Oct. Term, 1968, p. 100; see also Zenith Reply Brief in No. 49, Oct. Term, 1968, pp. 43-44). Now, however, Zenith implies that the injunction has no real significance.

recovery for damages resulting from damage period conduct (AA. 59-61), Zenith's argument comes down to a contention that, as a matter of public policy or public concern, it should be awarded the entire amount it originally claimed irrespective of the validity of the defenses interposed by HRI.

Zenith's contention (Z. Br. 20) that an "enforced treble damage judgment" will have a "deterrent effect" of course ignores the fact that the Court of Appeals expressly recognized that Zenith is entitled to a treble damage judgment in this case in an amount equal to three times the damages suffered by Zenith attributable to damage period conduct (AA. 59-61). What Zenith is asking this Court to bestow on it is an *additional grant* of all of those asserted damages allowed by the trial court judgment which were based upon pre-damage period and pre-release conduct of the Canadian pool, and which are therefore barred by limitations and release and not lawfully recoverable (pp. 22-42, *supra*).

It is also contended that the granting of these additional sums to Zenith "is *necessary*" to further the deterrent effect of the antitrust laws and will "redound to the benefit of other American companies" (Z. Br. 20). Thus, Zenith would have the Court ignore the defenses of limitations and release and award Zenith the additional damages barred by those defenses, under the guise that a huge award to Zenith will serve as a deterrent effect and benefit others. If this same illogic had been applied to Zenith's claims for damages as to England and Australia in this case it would have resulted in a reinstatement of the original awards as to those countries notwithstanding the fact that, as the Court of Appeals found and this Court agreed, the record did not show that Zenith had suffered *any* damages as to those countries (p. 7 n. 4, *supra*). Indeed, all of Zenith's "public policy" contentions alleged to support its claim for

almost $19 million in treble damages with respect to the conduct of the Canadian patent pool should be considered in light of Zenith's similar arguments[37] that such a policy required that it be awarded almost $16 million (reduced from $30 million) with respect to its other claims in this case that have now been rejected both by this Court and by the Court of Appeals.

Zenith originally persuaded the trial court to enter findings in January, 1965 (drafted by Zenith) which, after trebling, would call for a damage judgment of almost $49 million (Findings XXXVI, A. 2908). About $30 million of these damages was based upon alleged interference with Zenith's export business to England and Australia and almost $19 million as to Canada. Following only limited further hearings in late 1965 concerning the alleged damages to Zenith's export business to England and Australia, the trial judge recognized that he had been misled and reduced his award as to those countries by nearly $14 million, down to approximately $16 million (Amended Findings XXXVI, A. 3537, 3539; see also A. 3525-26). On appeal the Court of Appeals held that Zenith in fact had suffered *no damage* in those countries (A. 4256-57) and this Court affirmed (AA. 14, 25-29; 395 U.S. at 114, 125-29). If HRI had been denied the opportunity to pursue its remedies, Zenith would have been awarded almost $30 million based on alleged "damages" which Zenith *said* it had suffered, but which in fact it had not.

In addition, after Zenith got the trial court to enter the findings calling for treble damages of almost $49 million, it was apparent to Zenith that HRI could pay only a small portion of this amount, its net book value at the end of 1964 being only about $3,184,419 (A. 3007). Accordingly,

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[37] See page 35 of Zenith's Reply Brief in No. 49, October Term, 1968.

Zenith for the first time asserted that the parent Hazeltine Corporation should be bound by the judgments and the trial court entered the judgments requested by Zenith. However, the Court of Appeals held that the judgments against Hazeltine Corporation were void for want of jurisdiction (A. 4240-44) and this Court affirmed (AA. 10; 395 U.S. at 110).

Arguments that the "public interest" justifies a multimillion dollar treble damage award to a private claimant ring particularly hollow when that claimant is someone who has already demonstrated an eagerness to receive millions of dollars in "treble damages" without legal right, as Zenith did in its claims as to England and Australia. Moreover, Zenith is not some small company fighting for its life, but a giant in its industry, again asking to be awarded a sum not only legally unjustifiable, but which would be totally destructive to HRI, since $18,892,173 is far in excess of its net worth.

We recognize that this Court and the lower federal courts, including the Seventh Circuit, have repeatedly held that the policy of the antitrust laws is furthered by permitting liberality as to the proof of the amount of damages suffered by an antitrust plaintiff. However, there is no public policy which requires that the statute of limitations or the law as to the settlement and release of claims should be ignored in antitrust cases. On the contrary, the Congress has adopted a statute of limitations specifically applicable to antitrust treble damage cases (15 U.S.C. § 15(b)), and the courts have held (pp. 28-31, *supra*) and Zenith has admitted (p. 28, *supra*) that the law of release applies to antitrust treble damage cases.

The Court of Appeals has recognized Zenith's right to recover damages resulting from damage period conduct and

has provided for a remand so that the amount of such damages may be determined. Nothing in its opinion in any way deprives Zenith of the rights and protections afforded treble damage plaintiffs under the *Bigelow* case and other applicable law. The public interest would not be served by acceding to Zenith's demands that the law be ignored so that Zenith may receive great sums of money to which it is not lawfully entitled.

CONCLUSION

We respectfully submit that the ends of justice require that the judgment of the Court of Appeals be affirmed so that the case may go back to the trial court for a determination of the amount which HRI owes to Zenith.

Respectfully submitted,

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Dated June 1, 1970

FILE COPY

SEP 26 1

E. ROBERT SEAVER,

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970.

No. 80

ZENITH RADIO CORPORATION, A CORPORATION,
Petitioner,

vs.

HAZELTINE RESEARCH, INC., A CORPORATION,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

REPLY BRIEF FOR PETITIONER ZENITH RADIO CORPORATION.

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IN THE

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OCTOBER TERM, 1970.

No. 80.

ZENITH RADIO CORPORATION, A CORPORATION,
Petitioner,

vs.

HAZELTINE RESEARCH, INC., A CORPORATION,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

REPLY BRIEF FOR PETITIONER ZENITH RADIO CORPORATION.

QUESTIONS PRESENTED.

At pages 1 and 2 of respondent's brief an attempt is made to amend the questions presented to this Court in the petition for certiorari. Under Rule 23 of the Rules of this Court the questions presented are those set forth in the petition on which the writ was granted. Here they are set forth at pp. 4-6 of petitioner's main brief.

REPLY TO RESPONDENT'S STATEMENT OF THE CASE.

We believe that we have made an adequate and accurate statement of the case at pages 6-13 of petitioner's main brief. We see no purpose to be served in taking issue with the various mis-statements made in respondent's statement. Those that are relevant are answered in the argument.

In the statement of the case and in the entire seventy-five pages of respondent's brief there is not a single record reference to any evidence that negatives in any particular petitioner's proof of the amount of its damages. The court below has at least rendered "lip service" to the legal sufficiency of these proofs. In its last opinion it says (AA 59-60):

> "There was testimony for Zenith, relied on by the district court, that in the four year damage period, had Zenith been free from the unlawful activity of the Canadian pool which virtually excluded it from the Canadian market, it would have enjoyed the same proportion of that market as it did in the United States market. In Canada its principal competitors were the same as those in the United States. Its promotion and advertising flowed back and forth between the two countries. Distributors in Canada were available, but were frightened off by the pool's activities and threats. It is our view that this was competent evidence, prima facie, upon which the amount of damage could be reasonably approximated by virtue of the Supreme Court's decision in *Bigelow* v. *RKO Radio Pictures*, 327 U. S. 251, 264-65 (1946)."

It was conceded in argument in the District Court by respondent's counsel that there can be no evidence proffered

at a new trial that could be described as "newly discovered". Counsel stated: ". . . in asking for this admittedly extraordinary relief here, that we are not doing so on the ground of newly discovered evidence . . ." (AA 156).

It is apparent that there is no evidence in this record that in the slightest manner contradicts the damage computation contained in petitioner's Exhibit D. X. 220 (A 2661). Referring to this Exhibit respondent's counsel in argument in the District Court (AA 247), said:

> "Now, I recognize that no objection was made at the trial. I recognize, your Honor, that you asked him [Dodds] if he had any objection and he said he did not. That is clear in the record."

Having no record facts with which to negative petitioner's damage computations, respondent's brief attempts to support the untenable limitations and release defenses relied on by the court below. The contentions are answered under appropriate headings in the argument section of this brief.

At pp. 69-71 of respondent's brief Zenith and its counsel are berated because on the remand of this case to the court below Zenith's counsel asked Judge Walter J. Cummings to recuse himself. That sworn petition was not denied. It is printed in full in the appendix (AA 48-51) and speaks for itself.

Respondent's attack on the legal sufficiency of the petition leaves the issue in the posture where HRI insists on the affirmance of a decision by a panel of the court below, a member of which panel argued their case in the prior RCA proceedings, represented their co-conspirators in the pool and negotiated a release of which HRI claims the benefit and which Judge Cummings, as a panel member of the court below now erroneously holds, deprives petitioner of the right to sustain its judgment.

ARGUMENT.

I.

THE DISTRICT COURT HAVING DECIDED THE STATUTE OF LIMITATIONS AND RELEASE ISSUES CORRECTLY, NO ERROR OF LAW EXISTS UPON WHICH THE ORDER OF THE COURT BELOW CAN BE SUSTAINED.

At page 62 of respondent's brief it is stated:

> ". . . the decision of the Court of Appeals was not that, as a matter of discretion, the trial court should have granted a new trial. On the contrary, the Court of Appeals held that the trial court had committed errors of law (namely, the failure to give proper effect to the statute of limitations and the release defenses) and that to correct those errors of law, the taking of additional evidence on the issue of the amount of recoverable damages is necessary."

Aside from all other contentions it must be apparent as a matter of simple logic, that if the District Court committed no error of law in rejecting these defenses there can be no justification for granting a new trial to correct "errors of law."

(a) No Part of the Cause of Action for Treble Damages Asserted in Petitioner's Counterclaim "Accrued" Prior to May 22nd, 1959 and Therefore as a Matter of Law Could Not Be Barred by the Four Year Statute of Limitations.

The only damages asserted in the counterclaim were for lost profits occasioned Zenith by the illegal patent pool for the four years prior to the date on which it filed its counterclaim.

There is nothing in Section 4B of the Clayton Act which bars these damages. That Section provides (15 U. S. C. § 15b):

> "Any action to enforce any cause of action under sections 15 or 15a of this title shall be forever barred unless commenced *within four years after the cause of action accrued . . .*" (Italics ours)

The court below says: "The law with respect to the statute of limitations in Sec. 15(b) of the Clayton Act is that the period commences to run from the last overt act of the conspiracy" (AA 58).

There is nothing in the Act itself that says the limitations period "commences to run from the last overt act of the conspiracy." This is an interpolation into the Act by the court below which has no Congressional sanction whatever. Certainly the court below has no power to legislate by writing provisions into the Act which are not there.

In *Radovich*, 352 U. S. 445, 454 (1957) cited at page 32 of our main brief this Court said that the courts "should not add requirements to burden the private litigant beyond what is specifically set forth by Congress in those laws." Here it is quite apparent that this is exactly what the court below has done.

The cases relied on by the court below in making its addition to the burdens of the antitrust laws are set forth in its opinion (AA 58). Except for the decision in *Century Hardware Corp.* v. *Powernail Co.*, 282 F. Supp. 223, 227 (E. D. Wis. 1968) which obviously is not in point for other reasons, every single one of those decisions was rendered before the Federal limitations statute was either enacted or otherwise applicable.

Up until the enactment of the Federal limitations statute, as this Court knows, the limitations applied to antitrust damage actions stemmed from state statutes. Ob-

viously, cases construing the various provisions of state statutes are not determinative or even persuasive in the construction of a Federal statute.

As we pointed out in our main brief (p. 33) the words to be construed in the Federal statute are: "four years after the cause of action accrued". It is conceded at pp. 40-42 of respondent's brief that "a cause of action 'accrues' when the plaintiff has a right to sue." In order to contend that Zenith's cause of action had "accrued" prior to the damage period, respondent has to make the assumption that a cause of action for lost profits could accrue before the profits had been lost. The cases cited at page 41 of respondent's brief do not even intimate that such can be the law.

It is self evident that the present damage award could not have been sued for prior to the filing of petitioner's counterclaim. This follows from the proof Zenith had to adduce to support the award. Thus Zenith had to show three things on the damage issue: (1) Zenith had to be in the electronics business from May 22, 1959 to June 1, 1963 or prepared to engage in that business in Canada (see this Court's opinion concerning the damage claim in England and Australia AA 26, 29); (2) Zenith had to have a comparable profit comparison in the United States and this had to be during the same time period as the damage period; (3) the illegal Canadian Radio Patents Pool had to be in operation during the time of the entire damage period.

The record conclusively shows that none of these three factors could have been proved as a basis for Zenith's damage award prior to the damage period.

That this Court did not consider the statute of limitations a bar to petitioner's damage proofs is shown in its opinion as follows (AA 18):

"The evidence was quite sufficient to sustain a find-

ing that competing business concerns and patentees joined together to pool their Canadian patents, granting only package licenses and refusing to license imported goods. Their clear purpose was to exclude concerns like Zenith from the Canadian market unless willing to manufacture there. Zenith, consequently, was never able to obtain a license. This fact and the pool's vigorous campaign to discourage importers, distributors, dealers, and consumers from selling, handling, or using unlicensed foreign merchandise effectively prevented Zenith from making any headway in the Canadian market until after the 1957 settlement with RCA and its co-defendants. . . .

"This evidence clearly warrants the inference that CRPL's past conduct interfered with and made more difficult the distribution of Zenith products in 1959 and later years. The District Court could reasonably conclude that the cumulative effects of the pool's campaign against imported goods *had consequences lasting well into the damage period.*" (Italics ours)

When the opinion was written this Court had before it the entire record in the instant case. We submit that to resolve the issue of the "fact of damage" this Court of necessity had to hold tacitly at least that as held by the District Court (AA 17) either the statute of limitations defense had no merit or had been waived. The obvious reason for this is that if this Court believed that the defense of limitations was a bar to consideration of pre-damage period conduct referred to in the above quotation, it would not have held such evidence proved "the fact of damage" because the only "fact of damage" that is relevant is that found within the four year damage period.

The statute of limitations defense was either a bar or not a bar to petitioner's damage proofs. If it did not bar consideration of pre-damage period conduct on the "fact of damage" issue, *a fortiori* it could not bar consideration of

this same evidence on the amount of petitioner's damage accruing within the damage period.

This Court in its opinion says: ". . . the damage award was confined to injuries sustained during the statutory period . . ." (AA 16).

In footnote 13 of its opinion, this Court says (AA 17):

> "Zenith itself had requested damages only for the four-year period prior to the filing of its counterclaim, and the findings of the District Court expressly limited the damages awarded to those occurring 'during the 4-year statutory damage period.' "

In the present posture of this case, assuming *arguendo* that this Court's opinion and mandate permitted the court below to take a fresh hold on the limitations issue, the ultimate question has to be whether the four year statute of limitations can bar damages accruing within the damage period caused by pre-damage period acts. The court below held that limitations barred such damage, and the correctness of this ruling is squarely presented to this Court. In our view, as pointed out above, it has already been passed on by this Court in determining the "fact of damage" issue.

As we have shown in our main brief the instant case can not be distinguished from the case of *Foster & Kleiser* v. *Special Site Sign Co.*, 85 F. 2d 742, 751 (9th Cir., 1936) cert. den. 299 U. S. 613 (1937). There the Court said, "The gist of the action under this section is for injuries inflicted pursuant to the conspiracy *for which the wrongdoer is liable.*" Obviously HRI, the wrongdoer, has been held liable in the instant case only for damages sustained during the damage period and it must of necessity follow that a statute of limitations defense is not even relevant to that part of the wrongdoer's liability.

At page 33 of its brief, respondent is forced to take the

position that "the cause of action accrues and the statute of limitations starts to run from the damage-causing conduct." Aside from being contrary to the statute itself the argument obviously proves too much. The unconscionable result would ensue that Zenith could not recover for the lost profit when the "damage causing conduct" took place because no lost profits had "accrued" and could not recover for the lost profit when it had "accrued" because the damage causing act was barred by limitations.

Zenith did not sue for any profit lost outside the damage period. That it could not sue for or recover for lost profits before they accrued is held by the following cases. *Connecticut Importing Co.* v. *Frankfort Distilleries*, 101 F. 2d 79, 81 (2nd Cir. 1939); *Lawlor* v. *Loewe*, 235 U. S. 522, 536 (1915); *Flintkote Company* v. *Lysfjord*, 246 F. 2d 368, 396 (9th Cir. 1957), Cert. den. 335 U. S. 835 (1957). Cf. *Volasco Products Co.* v. *Lloyd Fry Roofing Co.*, 308 F. 2d 383, 396 (6th Cir. 1962).

The argument relied on by the court below was termed an "affront to reason" in the supplemental opinion in *Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.*, 377 F. 2d 776, 795 (3rd Cir. 1967). There the Court said:

> ". . . the fact that some of the injury and damage occurred outside the statutory period does not affect the plaintiff's right to recover for the separate invasion of its rights which occurred within the period. Indeed, any other rule would be an affront to reason, for it would require the conclusion that injury and damages which were inflicted, as in this case, in 1955, by concrete and specific business transactions, were barred by the statute of limitations as long ago as 1918 or even earlier, because of similar but not identical conduct."

This Court said in reviewing *Hanover*, 392 U. S. 481, 501, n. 15 (1968), decided while the instant case was pending before this Court, "United has also advanced the argument

that because the earliest impact on Hanover of United's lease only policy occurred in 1912, Hanover's cause of action arose during that year and is now barred by the applicable Pennsylvania statute of limitations. The Court of Appeals correctly rejected United's argument in its supplemental opinion."

Respondent's counsel, realizing that *Hanover* controls the instant case unless it can be distinguished, say at page 39 of their brief:

> "The decision of this Court in *Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.*, 392 U. S. 481 (1968), neither decided nor discussed the question whether recovery could be had for activities occurring prior to the relevant damage period."

On the contrary, this Court expressly decided that question and discussed it in note 15 of its opinion and described United's conduct as a type of restraint that could not be dealt with under the antitrust statutes as "a violation which, if it occurs at all, must occur within some specific and limited time span. . . . Rather, we are dealing with conduct which constituted a continuing violation of the Sherman Act and which inflicted continuing and accumulating harm on Hanover."

We submit, that any fair reading of this Court's opinion in *Hanover* must compel the conclusion that the "accumulating" harm resulting in damages to Hanover during the damage period was the result in part at least of illegal activity by United prior to the damage period, i.e. the creation of the restrictions on the use of the shoe machinery. It is therefore apparent that *Hanover* cannot be distinguished from the instant case and must control its disposition.

Further, this Court in the instant case has already held that the harm done Zenith by the pool during the damage period was "continuous" and "accumulating". It said:

"The District Court could reasonably conclude that the cumulative effects of the pool's campaign against imported goods had consequences lasting well into the damage period" (AA 18).

This Court further said (AA 19):

> "We also conclude that the record evidence is sufficient to support a finding of damage resulting from events occurring after the beginning of the damage period. . . . HRI frankly conceded the continuation of the pool before the District Court, and it appears sufficiently clear that throughout this time Zenith was deprived of what had always been refused it—a license on pool patents permitting it to sell American-made merchandise in Canada."

In the Court of Appeals' supplemental opinion in *Hanover*, the Court said: "The policy of the statute of limitations is maintained by allowing recovery for measurable injury within the period and barring recovery for injury beyond it." *Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.*, 377 F. 2d 776, 795 (3rd Cir. 1967).

Respondent also says *Hanover* is distinguishable because the only damages there awarded "were those caused by illegal conduct *within* the applicable damage period . . ." (Res. br. 39).

Here this Court has already held (AA 17, n. 13):

> "Zenith itself had requested damages only for the four-year period prior to the filing of its counterclaim, and the findings of the District Court expressly limited the damages awarded to those occurring 'during the 4-year statutory damage period'. 239 F. Supp., at 76."

This Court further said in this case (AA 24):

> "The trial court was entitled to infer from this circumstantial evidence that the necessary causal relation between the pool's conduct and the claimed damage existed."

Since the District Court did find (A 2908) "that the necessary causal relation between the pool's conduct and the claimed damage existed," the court below on remand was not authorized to disturb the finding because this Court's ruling on this mixed legal and factual issue is the "law of the case" and is conclusive in the court below. See *U. S.* v. *Haley*, 371 U. S. 18 (1962); *U. S.* v. *Parke, Davis & Co.*, 365 U. S. 125 (1961); *Briggs* v. *Pennsylvania R. Co.*, 334 U. S. 304 (1948).

The cases cited in respondent's brief to support the decision of the court below that some part of the damage award is barred by limitations because the "overt acts" outside the damage period are barred are not in point and even if they were they could not stand against this Court's decision in *Hanover* or the implications involved in this Court's decision in the instant case.

In the case of *Crummer* v. *DuPont*, 223 F. 2d 238 (5th Cir. 1955), cited at pp. 34, 35, 36 of respondent's brief, plaintiff's business had been completely destroyed at a time when the suit was barred by limitations—there was no continuing impact at a time within the statutory damage period.

In *Farbenfabriken Bayer, A. G.* v. *Sterling Drug, Inc.*, 153 F. Supp. 589 (D. C. N. J. 1957), aff'd., 307 F. 2d 210 (3rd Cir. 1962), cited at pp. 34 and 36 of respondent's brief, a six-year New Jersey statute was involved. The complaint alleged no "overt act" of any kind within the statutory period. The case is so distinguished in *Schenley Industries, Inc.* v. *N. J. Wine and Spirit Wholesalers Ass'n.*, 272 F. Supp. 872, 887 (D. C. N. J. 1967) the Court saying:

> ". . . the defendants' reference to the so-called 'overt act doctrine' in this Circuit is misleading, since the *Farbenfabriken Bayer* case turned on the absence of any overt act alleged within the period of limitations."

In the case of *Momand* v. *Universal Film Exchange, Inc.*, 43 F. Supp. 996 (D. C. Mass. 1942), cited at pp. 36, 40-41 of respondent's brief, a continuing invasion of plaintiff's rights was involved. The case supports the position taken by petitioner here.

The "overt act" doctrine on which the court below relies is opposed by later and better reasoned decisions in other Circuits. Thus, in *Schenley Industries, Inc.* v. *N. J. Wine and Spirit Wholesalers Ass'n.*, 272 F. Supp. 872 (D. C. N. J. 1967), defendants moved to strike certain complaint allegations concerning "overt acts" occurring more than four years prior to the complaint on the ground that any damage claims based on such acts were barred by limitations.

The Court said (pp. 887, 888):

> "Schenley contends . . . it can even recover for damages caused by earlier acts which are part of a continuing conspiracy.
>
> "*Insofar as such acts are alleged to have caused damage within the last four years,* I agree. In the first place, the legislative intent behind Section 4B of the Clayton Act, 15 U. S. C. § 15b, was not so much the expunction of long standing claims as it was the effective enforcement of the Act through a uniform period of limitations throughout the nation which would reduce forum shopping. *Westinghouse Electric Corp.* v. *Pacific Gas & Electric Co.*, 326 F. 2d 575, 580 (9 Cir., 1964) . . .
>
> * * * * *
>
> "The Courts have resorted to a variety of metaphysical theories to deal with the conceptual complexities of an antitrust conspiracy in a sizeable industry. They are reviewed and disposed of to the satisfaction of this Court by the excellent and comprehensive opinion of Judge J. Skelly Wright in *Delta Theatres, Inc.* v. *Paramount Pictures,* 158 F. Supp. 644 (D. La. 1958). I agree with Judge Wright that in the case of a continuing conspiracy, the plaintiff

may recover for any damage which occurs within the period of limitations. See authorities cited in *Delta Theaters, supra,* 158 F. Supp. at page 649, n. 20, 21."

As stated by Judge Wright in *Delta Theaters* v. *Paramount Pictures,* 158 F. Supp. 644, 649 (E. D. La. 1958):

"... It is the opinion of this court that the better rule is that stated in the leading case of Bluefields S.S. Co. v. United Fruit Co., 3 Cir., 243 F. 1, 20: 'The statute began to run when the cause of action arose, and *the cause of action arose when the damage occurred.* Then action might have been brought.' In the case of successive damages suffered day by day from a continuing conspiracy, the statute begins to run on each day's damage as it occurs. When suit is brought, the plaintiff may recover only for damages inflicted during the period of limitation preceding the filing of the complaint." (Italics ours)

A Court of Appeals case decided after the enactment of the Federal statute of limitations and which is directly contrary to the decision of the court below, is *Highland Supply Corp.* v. *Reynolds Metals Co.,* 327 F. 2d 725 (8th Cir. 1964).

In that case an antitrust action was based on alleged violations of Section 7 of the Clayton Act and Section 2 of the Sherman Act against an aluminum producer which had acquired a florist foil company and then reduced prices of aluminum foil below the cost of production. The District Court dismissed the complaint on the ground that the acquisition and price cutting activities were the only damage causing overt acts, which acts had occurred more than four years prior to the filing of the complaint.

On appeal, the Eighth Circuit reversed on the ground that plaintiff's cause of action did not accrue until his damage was sustained. The Court said, p. 731:

"... the District Court in the case at bar, deeming Reynolds' 'acquisition' of Arrow and the date of the

latter's 'price reduction' as the two overt acts which could give rise to a private claim for damages by appellant, dismissed all its claims, with prejudice. This, solely on the ground that such overt acts occurred more than four years prior to the commencement of the instant action. Appellant's complaint . . . makes claim for damages because of appellee's violation of Section 2 of the Sherman Act, *supra,* during the entire time that Reynolds possessed monopoly power. The statute of limitations in respect to a private right of action under Section 5(b) [sic] of the Clayton Act, *supra,* 'beg(ins) to run when the cause of action (arises), *and the cause of action (arises) when the damage occur(s).*' . . ." (Italics ours)

The Court then said (p. 732):

> *"To hold otherwise, as the District Court ruled, is to say that some damage that might have been sustained by appellant was barred before it accrued;* i.e. before appellant sustained injury to its business or property because of appellee's continuous violation of Section 2 of the Sherman Act." (Italics ours)

We submit that a fair reading of the terms of the Federal limitations statute itself shows the decision of the court below to be based on false assumptions and to constitute clear error.

The cornerstone of the decision of the court below is *Steiner* v. *Twentieth Century-Fox Film Corporation,* 232 F. 2d 190 (9th Cir. 1956). The *rationale* of that case is analyzed and its fallacy made clear by the District Court opinion in *Streiffer* v. *Seafarers Sea Chest Corp.,* 162 F. Supp. 602 (E. D. La., 1958). There the Court said (p. 605):

> "In *Steiner* v. *20th Century-Fox Film Corporation, supra,* relied on by the defendant, this overt act rule was justified by analogizing the antitrust suit to an ordinary tort action for personal injury, where all damage subsequently appearing may be attributed to a single blow and must be recovered in a single

action. However, the damages inflicted by a conspiracy in restraint of trade *may arise from the cumulative effect of a great variety of business devices among which it is impossible to apportion each item of financial loss.* Moreover, in the case of a continuing business conspiracy, the plaintiff may bring his action only for such damages as are already apparent, for the incidence of future damages may depend on unpredictable factors. The conspiracy may cease, or a change in the business climate may render its efforts harmless to the plaintiff, or the plaintiff may voluntarily abandon his enterprise.

". . . and in antitrust cases, the rule is that the cause of action *accrues* on the occurrence of actual damage, and successive damage gives rise to successive causes of action against which the statute of limitations will run as they accrue day by day." (Italics ours)

The Court further said (p. 605): "The difficulties in applying the rule that the cause of action created by 15 U. S. C. A. § 15 accrues on the occurrence of an overt act were discussed by this Court in *Delta Theaters* v. *Paramount Pictures, supra.* The rule was rejected there as being in conflict with the terms of the statute itself which predicates the existence of the cause of action on the occurrence of damage *without regard to the time when the proximate cause of such damage was set in motion*" (Italics ours).

Actually, the court below has since tacitly conceded its error in a case it decided three months after the decision in this case. In the contract buyers case (*Baker* v. *F. & F. Investment*, 420 F. 2d 1191 (7th Cir. 1970)) the court below holds that the statute of limitations does not bar a suit for treble damages under the antitrust statutes for excessive payments made under installment contracts executed at a time barred by the applicable limitations statute. The case is in direct conflict with the decision

of the court below in the case at bar in its holding that damage causing acts outside the damage period, i.e. the execution of the installment contracts, can give rise to a suit for damages sustained within the damage period. Certainly the execution of the installment contracts had to contribute in some manner to the damage the contracts caused.

As a matter of interest the opinion in the contract buyers case was written by Judge Walter J. Cummings and joined in by Judge Roger J. Kiley, two of the judges on the panel who decided the instant case.

(b) The 1957 Release Could Not Be Held to Release a Cause of Action That Did Not Arise Prior to May 22nd, 1959 Without Construing It as a Contract to Bar Future Causes of Action Under the Antitrust Laws and Therefore Illegal.

Just as the statute of limitations has no application to damage claims accruing during the statutory damage period, so a release executed in September, 1957 could not release damages accruing from June 1, 1959 to May 31, 1963. This appeared self evident to the District Court.

The following colloquy occurred between the Court and respondent's counsel (AA 88-89):

> "The Court: When was the RCA release signed?
>
> "Mr. Kayser: It was signed as I understand it, on September 27, 1957.
>
> "The Court: As I understand it, they are only claiming according to your chart, from May 22 of 1959 to May 22 of 1963.
>
> "Mr. Kayser: Yes, your Honor, that is very true.
>
> • • • • •
>
> "The Court: I am not sufficiently astute today to understand your theory . . . so that I can understand how this release in '57 had anything to do with what occurred in '59 to '63."

We have already shown that petitioner's cause of action did not even exist until petitioner sustained damages in the form of lost profits.

Highland Supply Corp., 327 F. 2d 725 (8th Cir. 1964) discussed above, so holds as follows (p. 731):

> "Appellant's complaint . . . makes claim for damages because of appellee's violation of Section 2 of the Sherman Act, supra, during the entire time that Reynolds possessed monopoly power . . . *'the cause of action (arises) when* the damage occur(s).' *Then only can the action be brought.*" (Italics ours)

However, the court below construes the release to bar "recovery from HRI of past, present and *future* damages flowing from any misconduct of HRI prior to the dates of the releases" (AA 57). So construed the release becomes a contract against public policy and illegal and void insofar as it is applied to petitioner's damage award.

Since the damages allowed here embrace lost profits during the damage period which could not have "accrued" at all unless the Pool had continued its operations during the entire damage period, the inescapable effect of the construction of the court below is to release a future cause of action for treble damages under the antitrust laws. This was admitted by respondent's counsel in the District Court. Thus in colloquy with the Court the following occurred (AA 95):

> "The Court: . . . Assuming that perhaps there was a conspiracy in existence prior to the day of this release and that this conspiracy continues among other co-conspirators after the date of the release, what is Zenith's position in regard to those co-conspirators in the conspiracy that continues after the date of the release which in any way have some unlawful effect on Zenith's business?"

"Mr. Kayser: Well, I would think, your Honor, that absent any exceptional circumstances that this release would not apply."

A release attempting to destroy a future cause of action under the antitrust laws is illegal as against public policy. This is made patently clear in the case of *Fox Midwest Theatres* v. *Means,* 221 F. 2d 173, 180 (8th Cir. 1955) where the Court of Appeals said:

"Any contractual provision which could be argued to absolve one party from liability for future violations of the anti-trust statutes against another would to that extent be void as against public policy. (Citation). This is because the effect of such a release could be to permit a restraint of trade to be engaged in, which could have impact, not simply between the parties, *but upon the public as well.* Such a release, if recognized as having any validity of that nature, could therefore itself operatively serve as a contract 'in restraint of trade.' Section 1 of the Sherman Anti-Trust Act, 15 U. S. C. A., § 1, of course, brands all contracts in restraint of trade as 'illegal'." (Italics ours)

The cases of *Twentieth Century-Fox Film Corporation* v. *Winchester Drive In Theatre, Inc.,* 351 F. 2d 925, 931 (9th Cir. 1965) and *Dura Electric Lamp Co.* v. *Westinghouse Electric Corp.,* 249 F. 2d 5 (3rd Cir. 1957) on which the court below relies to sustain its holding did not involve a release of future damages and did not consider the question of whether the common law doctrine of constructive release extends to damages which had not accrued and could not be sued for at the time of the release. Obviously the cases cited are not in point.

The cases cited at page 24 of respondent's brief are not antitrust cases and no issue of illegality was raised or decided. Nor do those cases hold that a party not named

in the document can have the benefit of contractual provisions concerning "future damages resulting from conduct occurring prior to their execution" under the doctrine of "constructive release."

In its brief, page 31, respondent says there is nothing in *Mercoid Corp.* v. *Mid-Continent Investment Co.*, 320 U. S. 661 (1944) or *Sola Electric Co.* v. *Jefferson Electric Co.*, 317 U. S. 173 (1942) "either directly or by way of analogy, which would indicate that the releases should not benefit HRI. Those cases stand for the proposition that federal law should control in deciding federally created rights or liabilities, . . ." We cited those cases in our main brief to show that common law doctrines should not be extended as the court below attempts, to limit federally created rights, namely, treble damage suits under the antitrust statutes.

In colloquy about the release in the District Court the following occurred (AA 93, 94):

> "Mr. Kayser: . . . This is an unqualified release of these three. Anybody else which according to Zenith was a party up to September 27, 1957 is released, released them for everything that they did in the past up to that time for all damage which might thereafter be suffered from any acts which occurred up to September 27, 1957. Anything which results after the date from any act done by any of them up to that date.
>
> "The Court: Is it your theory that this release releases all the members of the Canadian Pool? I want to be clear on this.
>
> * * * * *
>
> "Mr. Kayser: Yes it does, your Honor. There are at least three cases clearly on the point involving antitrust treble damage cases.
>
> "The Court: That is by releasing one conspirator in a conspiracy you automatically release all other conspirators from the beginning of the world to the end of the world.

"Mr. Kayser: No, no, up to the time of the release and for any acts or any damage suffered thereafter by reason of acts occurring up to the time.

"The Court: By another co-conspirator who is not a party to the release?

"Mr. Kayser: Yes, your Honor, I don't think that there is any question that that is the law."

Neither in the District Court, the Court of Appeals, nor here has respondent cited any authority to support that position except the decision of the court below. On the other hand, the *Sola* and *Mercoid* cases (discussed at pp. 39, 40 of our main brief) squarely hold that to "the federal statute and policy, conflicting state law and policy must yield." And, as we have shown, to extend the common law doctrine of "constructive release" to a person not a party to the document for a time subsequent to its date and thus to grant a complete release of a cause of action not arising for more than a year and a half after the release was signed, is violative not only of the policy of the statute but of the express provisions of the Federal antitrust laws as well.

(c) Under the Clear Language of the RCA Settlement Agreement, HRI Was Not Entitled to the Benefit of the Releases.

The Court of Appeals, in a one sentence adoption of the respondent's release argument, based its decision on the erroneous factual premise that the settlement documents contain no limitation with respect to co-conspirators intended to be bound or benefited. The Court said: (AA 57).

"Since . . . Zenith did not reserve its right against HRI, the releases given by Zenith clearly barred recovery from HRI of past, present and *future damages* flowing from any misconduct of HRI prior to the dates of the releases. *Twentieth Century-Fox Film Corp.* v.

Winchester Drive-In Theatre, 351 F. 2d 925, 931 (9th Cir. 1965), *cert. denied*, 382 U. S. 1011 (1966); *Dura Electric Lamp Co.* v. *Westinghouse Electric Corp.*, 249 F. 2d 5 (3rd Cir. 1957)."

Respondent attempts to defend this position at pages 28 et seq. of its brief without making any reference to or explanation of the express limitation with respect to the parties covered which appears in its own Exhibit No. 48 upon which it relies (A 2783), i.e., the RCA settlement agreement describing and providing for the contemporaneously prepared and executed releases. The limitation of the releases with respect to parties covered is clearly spelled out in the first paragraph of the agreement:

> "1. All parties to the Delaware action (C. A. No. 1247, consolidated action) and to the Chicago action (No. 48 C 1818) to dismiss all their claims with prejudice; RCA, GE and Western Electric each to grant Zenith and Rauland, respectively, a general release and Zenith and Rauland each to grant RCA, GE and Western Electric, respectively, a general release, *each such release, to the extent either party may request, to bind or benefit the parent*[1] *and subsidiaries* of the party giving or receiving such release ('subsidiaries' to include corporations in which the party has stock ownership of 50% or more)."[2] (Italics ours)

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1. In the case of Western Electric, the inclusion of "parent" was necessary to extend the release to A. T. & T. of which Western Electric was a subsidiary since A. T. & T. was not a party to the litigation.

2. As respondent's counsel correctly note, the releases "were part of the settlement" agreement (Res. br. pp. 22-23). However, the releases were deleted from Exhibit 48 and are not in evidence because Hazeltine offered the agreement and the pleadings in the RCA case in support of its then representation to the trial court that Hazeltine had no relationship whatsoever with any of the activities of the conspirators involved in the RCA case (A 393-6, 658-660, 921-2). This is a position exactly opposite to the one now taken, i.e., that HRI was a full fledged member of the conspiracy and therefore entitled to assert the alleged release.

Clearly paragraph 1 of the agreement, consonant with the concurrently referred to releases, spells out with particularity that each release binds or benefits only the party and the parent and subsidiaries of the party giving or receiving it and the benefits are further strictly limited to "subsidiaries . . . in which the party has stock ownership of 50% or more." Even if RCA, G. E. or Western Electric owned 49% of the stock of HRI, under the plainly expressed reservation and limitation of the settlement agreement they could not properly claim any "benefit." Yet respondent's counsel, at page 22-23 of their brief, with no explanation state:

> "The releases in question were part of the settlement of prior litigation between Zenith and its subsidiary on the one hand and RCA, General Electric and Western Electric on the other hand . . .
>
> "In September 1957, the *RCA-Zenith* litigation was settled without trial (PX 43, 48, A. 2751-52, 2783-86) . . . *There was no reservation of rights against third parties.*" (Italics ours)

The settlement agreement clearly expresses the intent to exclude from any "benefit" even subsidiaries of the parties in which their stock ownership is less than 50% and, *a fortiori,* all other conspirators not within the definition.

The very authorities respondent induced the Court of Appeals to rely upon and which it now urges upon this Court adopt the modern rule which gives effect to such expressed intentions to limit the parties to be covered and the holdings of those cases therefore defeat the respondent's argument on the facts of this case. See cases cited in opinion of court below (AA 57).

Respondent contends quite correctly that the courts in the cited cases adopted the so-called Restatement of Torts rule governing releases in antitrust conspiracy cases. In *Twentieth Century-Fox* the Court succinctly stated that rule as follows:

> ". . . the modern majority rule [is] that joint tortfeasors are released *unless* an express contrary intention is demonstrated . . ." (*Twentieth Century-Fox Film Corp.* v. *Winchester Drive-In Theatre,* 351 F. 2d 925, 931).

The fundamental rule of construction, *Inclusio Unius Est Exclusio Alterius,*[3] would be enough to exclude respondent. In addition, as pointed out above, under the clear language of the agreement, respondent would be entitled to the benefits of the releases only if it was a co-conspirator in which RCA, G. E., or Western Electric owned 50% or more of its stock. If RCA, G. E. or Western Electric owns a stock interest in HRI sufficient to bring it within the specific terms of the settlement agreement and release, counsel have carefully concealed that fact from the record.

While the Restatement rule adopted in the cited cases is sufficient to destroy respondent's position on the facts of this case, there is the more reasonable modern rule followed by a number of courts and adopted in § 877 of the California Code of Civil Procedure and in § 4 of the Uniform Contribution Among Joint Tortfeasors Act. Under that rule "A release by the injured person of one tortfeasor . . . does not discharge other tortfeasors unless the release so provides." The District Court in the *Twentieth Century-Fox* case persuasively reasoned that this rule should be adopted by the Federal courts rather than the Restatement rule. *Winchester Drive-In Theatre* v. *Twentieth Century-Fox Film Co.,* 232 F. Supp. 556, 562 (N. D. Cal. S. D. 1964). It more logically places the burden on the wrongdoers to negotiate for their co-conspirators and to specifically provide for their release. There is no persuasive reason for shifting that burden from wrongdoers to their injured

3. "The certain designation of one person is absolute exclusion of all others." Black's Law Dictionary, 4th ed., page 906.

victims. The wrongdoers know the identity of all the co-conspirators while their victims often do not.

This Court generally expressed its approval of the modern rules in *Aro Manufacturing Co.* v. *Convertible Top Co.*, 377 U. S. 476, 501 (1964), when it said:

> ". . . It is also true that under the old common-law rule, a release given to one joint-tortfeasor necessarily released another, even though it expressly stated that it would have no such effect. See Prosser, Torts (2d ed. 1955), at 243-244. . . . But the rule is not applicable. Even in the area of nonpatent torts, it has been repudiated by statute or decision in many if not most States, see Prosser, supra, at 245, and by the overwhelming weight of scholarly authority. E.g., American Law Institute, Restatement of Torts (1939), § 885(1) and Comments b-d . . ."

While the Court cited the Restatement, its further reference to page 245 of Prosser indicates that Prosser's recommendation for the adoption of the more liberal and logical version might be adopted in an appropriate case.

Prosser's recommendation is as follows (p. 245):

> "The only desirable rule would seem to be that a plaintiff should never be compelled to surrender his cause of action against any wrongdoer unless he has intentionally done so, . . ." (See p. 272 3rd ed. 1964).

Under either version of the rule, however, respondent's position is untenable on the facts of this case. Since the RCA agreement contained express limitations as to the parties intended to be released and HRI was not included therein, it was error to hold that HRI was entitled to the benefit of the release even assuming it were otherwise applicable.

Finally, even accepting *arguendo* the farthest reaches of respondent's release argument, the most that can be said for it is that some pre-damage period illegal activity was mixed with damage period illegal conduct to cause

the petitioner's four year loss of profits. Since the cumulative effects of such pre-damage period conduct could not be measured until Zenith actually entered the Canadian market, the 1957 release in all events could not bar recovery of such future damages (See pp. 9, 18-20 *supra*). Moreover, the lost profits resulted from a combination of the cumulative effects of pre-damage period activity and the continuation of the pool during the damage period. Petitioner therefore was not required to apportion its damages between such pre-damage and damage period activity. This Court so holds in its opinion, which is the law of this case, saying (AA 14, n. 9):

> "... It is enough that the illegality is shown to be a material cause of the injury; a plaintiff need not exhaust all possible alternative sources of injury in fulfilling his burden of proving compensable injury under § 4. *Continental Ore* v. *Union Carbide & Carbon Corp.*, 370 U. S. 690, 702 (1962); *Perma Life Mufflers, Inc.* v. *International Parts Corp.*, 392 U. S. 134, 143-4 (1968) (concurring opinion)."

See also this Court's discussion of a tortious admixture of legal and illegal damage causing acts in *Bigelow* v. *RKO Radio Pictures, Inc.*, 327 U. S., at page 265, in which the rule to be applied is the same as that in the tortious confusion of goods.

Since, as we have shown, the District Court decided the issue of the releases correctly by refusing to change its Canadian damage findings no mistake of law in the District Court's ruling is shown.

(d) The Affirmative Defenses of Limitations and Release Were Waived Under Rule 12(h) of the Federal Rules of Civil Procedure.

We pointed out in our main brief that the court below made no attempt to rule on the merits of the waiver issue but cavalierly disposed of it by saying (AA 56):

> "It is our view that the court's ruling was not on the basis of waiver, but because the defenses on their merits did not bar Zenith's recovery."

Certainly the court below had no way of knowing what was in the trial court's mind and there is nothing in the record to show that the trial court did not base its rejection of the affirmative defenses, as stated by this Court, on either a lack of merit or waiver. However, what the trial court had in mind is beside the point. The question presented here is whether its decision is right.

This Court ruled that the trial court either rejected the limitations defense or considered it waived under Fed. R. Civ. Proc. 12(h) (AA 17). In *Delk* v. *St. Louis & S. F. R. Co.*, 220 U. S. 580, 588 (1911), it was held that on certiorari, ". . . this court has the entire record before it, with the power to review the action of that court, as well as direct such disposition of the case as that court might have done . . ." We pointed out in our main brief that if the decision of the trial court to reject the affirmative defenses was correct *on any ground* it should have been affirmed by the court below and therefore should now be affirmed here.

We have shown in the preceding sections of this brief that the rejection by the trial court of these defenses on their merits was a correct decision and that the court below is in error in holding to the contrary. It is equally true that the decision of the court below can and should be

reversed on the ground of waiver. Certainly, this Court cannot be precluded from ruling on the issue by the statement of the court below that "the [trial] court's ruling was not on the basis of waiver."

The waiver issue has already been argued in our main brief, pp. 42-45, and that argument need not be repeated here. However, at pp. 51-55 of its brief, respondent takes a new approach and attempts to torture the record into a showing that the trial court excused its late assertion of the so-called affirmative defenses by permitting it to make a late filing of its pleas of limitations and release.

The trial court was very careful not to permit these defenses to be filed *nunc pro tunc* as of the date of respondent's answer to the counterclaim in 1963. If it had done so it could have been plausibly argued that an amendment to the answer had been permitted. In fact, however, leave to file the defenses in support of a motion to dismiss was permitted *nunc pro tunc* as of April 1, 1965 (AA 254), the date the motion was made. The defenses and motion were then actually filed within the ensuing five days (A 3048, 3049) after the District Court had already ruled that there would be no change in the findings as to Canada (AA 251). This was almost two years too late because under Rule 8(c) of the Federal Rules of Civil Procedure an affirmative defense such as release or limitations must be pleaded in the answer and under Rule 12(h) it is waived if not presented in the answer.

As the court below said in a different case:

> "Defendants having failed to plead the statute of limitations, it was waived. Defendants subsequent motion for a summary judgment did not revive a defense which had been waived . . ." (*Roe* v. *Sears, Roebuck & Co.*, 132 F. 2d 829, 831 (7th Cir. 1943)).

Here, respondent never even asked for leave to amend its answer or to file the defenses *nunc pro tunc* as of the date of its answer to the counterclaim. Further, the trial court in refusing to reopen or set for rehearing its Canadian damage findings showed that there was no action by the trial court that even by inference or implication could be construed as being in relief of respondent's waiver so as to permit a trial of the limitations or release issues.

At page 52 of its brief respondent again argues its contention, which was overruled by the trial court, that the reason it did not plead limitations or release with its answer was that they were not relevant to the cause of action as respondent's trial counsel, Lawrence Dodds, understood it.

This entire contention was based on respondent's false assertion that its counsel was mislead by an affidavit of Frank Crotty, Zenith's patent counsel (A 63). Only an excerpt from the affidavit is quoted and the whole contention was a complete misrepresentation in order to persuade the trial court that Crotty was limiting the allegations of the counterclaim to a claim for damages between the time of the filing of Zenith's answer to the patent infringement complaint in April, 1960 and the filing of the counterclaim on May 1, 1963.

Counsel do not point out that the Crotty affidavit made all the allegations of the counterclaim a part of the affidavit by reference (A 63). Moreover, the counterclaim in no way limited Zenith's claim for four years of damages (A 64-69).

Further, the motion for leave to file the counterclaim stated "Said counterclaim arises out of the matters set forth in paragraphs 12 and 13 of defendant's answer herein *and* current related unlawful activities of plaintiff occurring since the filing of the answer . . ." (A 62) (Italics ours).

Unfortunately for the respondent's contention Lawrence B. Dodds as respondent's counsel, in his trial brief described the damage period as "for the four-year period from June 1, 1959 to May 31, 1963".[4]

The trial court was singularly unimpressed with the contention that respondent's counsel did not know four years of damages was being sought and therefore had not raised the limitations and release defenses in the answer. In the course of the argument the following colloquy occurred (AA 144):

> "The Court: I say we are on notice pleading here in the Federal Court . . .
>
> "Mr. Kayser: That's right, and we had no notice of this cause of action, your Honor. That is the point.
>
> "The Court: I mean, it may be due to somebody's inability to understand the English language, but to me it appears you have notice based upon what I read to you yesterday."

And the further colloquy took place (AA 87):

> "The Court: Do you think this is merely gilding the lily and has no legal effect in their counterclaim when they refer to the conspiracy to prevent importation . . . Is that just nice language or is it the basis of a law suit?
>
> "Mr. Kayser: It is not the basis of the lawsuit which they pleaded, your Honor . . .
>
> * * * * *
>
> "The Court: Well, I can't say that, looking at the pre-trial briefs, that there wasn't adequate warning that this was their theory prior to the time that any evidence was adduced. * * * That is the nub of the whole question, *and the nub of the damages was the failure to permit importation of American-made merchandise into these three countries.*" (Italics ours)

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4. Zenith Court of Appeals Appendix pp. 348 & 447 which appendix constitutes part of the record in this cause.

That the trial court never intended to excuse respondent's 'waiver' of the so-called affirmative defenses is shown by the court's statement ". . . there has to be an end of litigation. I don't intend to permit a second chance to do the things that might have been done at the first trial" (A 3527).

The attempt by respondent's counsel to twist a record such as is shown by the above into a ruling by the trial court excusing respondent's waiver of affirmative defenses because of "surprise" is obviously without merit.

Finally, the court below could take no action under the express direction of this Court's mandate which was inconsistent with this Court's opinion.

This Court's reference to the release and limitation defenses as "belatedly raised" (AA 17) is certainly inconsistent with a ruling that they were pleaded in time and are still in the case. Nor can meaning be given to the words "unwaived" and "properly asserted" appearing in this Court's opinion if the defenses were unwaived (AA 17, n. 13). In using these words this Court expressly pointed out that it need not "deal with the question of whether damage period injury from pre-damage period conduct is recoverable where an unwaived statute of limitations defense is properly asserted" (AA 17). We suggest that the use of such qualifying words can mean only that this Court considered these defenses "belatedly raised" and that the effect of the District Court's rejection of the defenses was to hold them waived. If we are correct in this analysis then the decision of the court below granting a new trial of the damage issue is inconsistent with this Court's opinion and must, aside from all other reasons, be reversed because not authorized by this Court's mandate.

We submit that a clear case of waiver is presented and

that in effect the District Court so ruled and that such ruling could not be reversed by the court below by its statement "It is our view that the court's ruling was not on the basis of waiver, . . ." (AA 56).

II.

THE PROOF OF THE AMOUNT OF PETITIONER'S DAMAGE IS LEGALLY SUFFICIENT TO SUSTAIN THE DAMAGE AWARD.

(a) There Is No Merit in Respondent's Mature Market Argument.

There is an involved and "metaphysical" argument advanced at pp. 18-22 of respondent's brief to the effect that petitioner's damage computation is legally insufficient because based on a "mature market" concept. The trial court found no merit in it and refused to disturb its Canadian damage findings on account of it. The court below has likewise refused to follow it.

In colloquy between the trial court and respondent's counsel the following occurred (AA 97):

> "Mr. Kayser: . . . Zenith [is] claiming, as they do, a fully mature market here beginning May 22, 1959.
>
> "The Court: They claim they had a mature market or that but for the conduct of Hazeltine they would have had one.
>
> "Mr. Kayser: They are claiming that they were entitled to the benefits of a fully matured market, yes.
>
> "The Court: Which they said they would have had, had it not been for the conduct of Hazeltine as co-conspirators.
>
> "Mr. Kayser: That's right.
>
> "The Court: All right."

Actually the proofs showed Zenith had the same share of the Canadian market in 1959 as in 1963, i.e., 3.1% in 1959 and 3.2% in 1963 (AA 16), showing that faced with pool re-

strictions Zenith could never improve its market position in Canada.

The court below concedes that the proper measure of the amount of petitioner's damage was applied by the District Court. It said (AA 59): "The measure of proof is the difference between the percentage share that Zenith actually enjoyed during the damage period and the percentage it would have had as a free competitor."

The only available measure of what Zenith could do "as a free competitor" was in the comparable United States market during the damage period when and where it was a "free competitor".

This Court, tacitly at least, approved respondent's proof when it said (AA 16, n. 11): "The computation of damages, prepared by Zenith's experts and accepted by the District Court, see 239 F. Supp., at 76, reflects a comparison between Zenith's percentage share of the United States television market, ranging from 15.6% in 1959 to 21.7% in 1963, and Zenith's actual share of the Canadian market during the same period, ranging from 3.1% in 1959 to 5.2% in 1961 and down to 3.2% in 1963. Although we discuss only the measure of damages utilized for computing Zenith's injury in the Canadian television market, a comparable method was employed to determine Zenith's lost radio sales."

The court below also concedes its validity saying (AA 60): "It is our view that this was competent evidence, prima facie, upon which the amount of damage could be reasonably approximated by virtue of the Supreme Court's decision in *Bigelow* v. *RKO Radio Pictures,* 327 U. S. 251, 264-65 (1946)."

This Court in admonishing the court below to follow the teachings of *Bigelow* said (AA 23):

> "In *Bigelow,* a treble-damage plaintiff claimed injury from a conspiracy among film distributors to

> deny him first-run pictures. He offered evidence comparing his profits with those of a competing theatre granted first-run showings and also measuring his current profits against those earned when first-run films had been available to him. This Court, reversing the Court of Appeals, found the evidence sufficient to sustain an award of damages."

Bigelow cuts the ground right out from under respondent's argument that such a comparison was invalid because it assumed a "mature market" for Zenith's products in Canada. In *Bigelow* the comparison was objected to on the ground that there was no proof of what petitioner's theatre would do with an earlier run of pictures because it had not had a "first run" playing position before and therefore had no mature "first run" playing position and also that the record affirmatively showed that both petitioner's theatre and the respondent's with which it was compared had always operated under the illegal Chicago system of release and therefore there was no open market comparison shown by the proofs.

As a matter of fact in *Bigelow* the Court of Appeals for the 7th Circuit had reversed the case because there, in contradistinction to here, there was no proof of an open market with which to compare the theatre's earnings in a restricted market (150 F. 2d 877, 884-885). This Court reversed that holding because the results of such a comparison were not available. The conspirators had prevented any open market comparison by destroying such an open market in the United States for motion picture films for over twenty years.

In *Bigelow*, 327 U. S. at 264, 265, it was further said:

> "... [I]n the absence of more precise proof, the jury could conclude as a matter of just and reasonable inference from the proof of defendants' wrongful acts and their tendency to injure plaintiffs' business, and from

> the evidence of the decline in prices, profits and values, not shown to be attributable to other causes, that defendants' wrongful acts had caused damage to the plaintiffs . . .
>
> "The most elementary conceptions of justice and public policy require that the wrongdoer shall bear the risk of the uncertainty which his own wrong has created."

Here respondent asserts (Res. br. 21) its continuous wrongdoing since 1926 as a member of the Canadian Pool to show that it had made proof of a mature market in Canada unavailable.

The argument is not only precluded by *Bigelow* but it ignores the fact that proof of a "mature market" in Canada was not only unavailable but irrelevant because petitioner's damage exhibit did not compare two market periods in Canada but the illegally restricted market result in Canada with the free market result in the United States during the same period of time.

However, there are other reasons why there is no merit in the "mature market" argument. At best it is an argument directed at the weight of petitioner's Exhibit D. X. 220 (A 2661) which was admitted in evidence without objection (A 769) and which the court below concedes makes out a prima-facie case of the amount of petitioner's damages.

The court below held in the case of *Milwaukee Towne Corp.* v. *Loew's, Inc.,* 190 F. 2d 561, 566 (7th Cir. 1951), that if the evidence of the amount of damages is competent the weight of the evidence is for the trier of the facts.

The Court said:

> "Neither do we need to follow defendants in their detailed argument designed to show numerous fallacies and inaccuracies in the exhibit prepared and submitted by plaintiff's accountant, for the reason that under the rationale of the *Bigelow* case we are satisfied that

> it was within the province of the trier of the facts to rely upon the computations there disclosed, providing, of course, there was proof of the fact of damage . . ."

Here the fact of damage issue is concluded by this Court's opinion.

There are still other reasons why there is no merit in the respondent's "mature market" theory in Canada.

Joseph Wright, Zenith's president, testified without contradiction that on June 1, 1959, "but for the pool" Zenith "would have had a going market there" (A. 3490).

Respondent says we cannot sustain this position because Zenith is barred from claiming damages resulting from conduct taking place at any time prior to the damage period or prior to the releases (Res. br. 24). If this contention could be valid it would destroy the probative value of a comparison which the court below has expressly approved and this Court has tacitly approved here and expressly approved in *Bigelow*. This must be so because the statute of limitations would thus always destroy proof that in the absence of the conspiracy a "mature market" position would have been attained.

(b) There Is No Merit in Respondent's Argument That Pre-Damage Period Conduct Could Not Be Considered on the Damage Issue.

The court below says, in paraphrasing this Court's opinion (AA 57):

> "Damages were awarded, the Court said, on the assumption that were it not for the conspiracy, Zenith would have had sixteen per cent of the Canadian market instead of its actual three per cent on May 22, 1959 and throughout the damage period. The Court then stated that since the district court attributed the deficient share on May 22, 1959 to the conduct of the pool, that conduct necessarily preceded the deficiency,

and therefore pre-damage period conduct necessarily resulted in some part of the damage awarded."

What the court below overlooks is that this fact is of no legal significance unless the pre-damage period illegal conduct is barred from consideration by limitations. We have shown at pp. 4-17 of this brief that it is not barred.

In addition to what we said there and without regard to the effect of tolling it is clear that the permissible limitations period would in any event extend back to April, 1956. Zenith's answer was filed April 7, 1960 and alleged in paragraphs 12 and 13 thereof as an affirmative misuse defense the same antitrust violations which were the basis for petitioner's proofs and judgment for treble damages. This pleading was the equivalent of a treble damage counterclaim. See *Dairy Foods, Inc.* v. *Dairy Maid Products Corp.*, 297 F. 2d 805 (7th Cir. 1961). The counterclaim filed in 1963 expressly adopted paragraphs 12 and 13 of the answer and as a supplemental pleading brought into the case damages for lost profits which had accrued both before and after the answer had been filed.

In its opinion this Court has already noted that the statute of limitations period could be expanded on the theory that the counterclaim related back to an earlier pleading. Thus this Court says (AA 8, n. 2):

> "No argument was made that the counterclaim, in whole or in part, related back to an earlier pleading, thereby expanding the damage period to include years prior to 1959, Cf. *Bull* v. *United States*, 295 U. S. 247, 262, and n. 10 (1935); *Cold Metal Process Co.* v. *E. W. Bliss Co.*, 285 F. 2d 231 (C. A. 6th Cir. 1960), cert. denied, 366 U. S. 911 (1961). Compare Fed. Rule Civ. Proc. 15(c) (amended pleading relates back to date of original pleading if the 'claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading')."

That argument is now made at page 35 of our main brief.

The respondent says our argument cannot be sustained that the District Court could infer from the evidence that the pool prevented an earlier beginning because the District Court made no finding to that effect.

Findings of fact are sufficient when they adequately apprise an appellate tribunal of the basis of the decision. *Seligson* v. *Roth*, 402 F. 2d 883, 887 (9th Cir. 1968); 5 Moore's Federal Practice (2nd Ed. 1969) ¶ 52.06[1], pp. 2705-17. We submit that the District Court's Finding XXXVI (A 2908) adequately disposes of the issue and this Court has concluded it by saying (AA 18):

> "It could also rationally be found from the evidence that Zenith, beginning in 1958, could not have reached its maximum potential by May 22, 1959, that the pool had effectively prevented an earlier beginning, and that Zenith therefor suffered damage during the damage period from having a smaller share of the market than it would have had if the pool had never existed."

On page 20 of its brief respondent argues that petitioner's Exhibit D.X. 220 (A 2661, A 519) showing the amount of petitioner's loss of profit in the Canadian market merely assumed that Zenith would have had a mature market at the beginning of the damage period. On the contrary, the assumption was supported by the testimony of both Wright, Zenith's President, and Kaplan, Zenith's Treasurer (A 461, 528), whose testimony this Court holds the trial court was entitled to rely on.

This Court said (AA 22, n. 18): ". . . and we see no adequate basis in the record for refusing to accept the testimony of the two Zenith officers as probative evidence."

That this Court is correct in its holding is shown by the corroborative evidence attached as Appendix B, Schedule 2, to Zenith's brief in No. 49 October Term, 1968 of

this Court showing that after the entry of the injunction against the pool on April 5, 1965, Zenith sales of television and radio increased from $4,719,000 in 1964 to $9,078,000 in 1966 and to $12,694,000 in 1967. Since these are public records this Court can take judicial notice of them.

In computing the lost sales in the Canadian market, Willis Stevenson, Zenith's accountant, testified that "We have applied the Zenith share of the domestic market as a percentage . . . to arrive at a Zenith share of the Canadian market, expressed in units."

> "The Court: Assuming their share would be what, the same as it is in America or what?
>
> "The Witness: The same as it is in the United States." (A. 513-14)

There was no objection to the witness' assumption at the trial and there is no testimony in this record that the witness' assumption was in error. The only thing opposing the testimony is respondent's lawyer's argument advanced for the first time a year after the trial and which in no event can prevail against this Court's clear ruling that (AA 24): "The trial court was entitled to infer . . . that the necessary causal relation between the pool's conduct and the claimed damage existed." The "claimed damage" was that shown in petitioner's Exhibit D.X. 220.

Finally, there was no way the court below could vacate petitioner's judgment for the Canadian damage without ignoring this Court's statement that (AA 23):

> "Trial and appellate courts alike must also observe the practical limits of the burden of proof which may be demanded of a treble-damage plaintiff who seeks recovery for injuries from a partial or total exclusion from a market; damage issues in these cases are rarely susceptible to the kind of concrete, detailed proof of injury which is available in other contexts. The Court has repeatedly held that in the absence of more precise

proof, the factfinder may 'conclude . . . that defendants' wrongful acts had caused damage to the plaintiffs.' "

III.

THE DECISION OF THE COURT BELOW IS INCONSISTENT WITH THE OPINION AND MANDATE OF THIS COURT AND THE PLACING OF LIMITATIONS UPON FURTHER PROCEEDINGS IN THE CASE CONSTITUTES CLEAR ERROR AND IS NOT AUTHORIZED BY THIS COURT'S MANDATE.

We have shown in the preceding sections of this brief that there is no error of law in the trial court's rejection of the affirmative defenses of release and limitations. If this Court agrees with our submission then consideration of the issues discussed under this heading becomes redundant so far as the reversal of the new trial order of the court below is concerned. However, since the instant new trial order is unauthorized by this Court's mandate and in present form not only destroys petitioner's rights but the rights of any future treble damage plaintiffs in the Seventh Circuit, we submit, a further discussion of the terms of that order is justified.

The court below has ordered a new trial on the irrelevant issues of release and the statute of limitations, granted respondent an opportunity to introduce evidence to show that Zenith's damage flowing from "damage causing acts" within the period did not amount to $6,297,371 and further reserved to itself the right to determine on a future appeal whether it thinks the damages subsequently to be allowed are "excessive" (AA 59).

(a) The "Overt Act" Doctrine Asserted by the Court Below Has Been Overruled by This Court.

While ambiguous, the opinion of the court below is certainly subject to the construction that on a new trial it limits proof of petitioner's damages to those flowing from specific, concrete "overt" acts occurring only during the damage period. We submit that it is self evident that such proof requirement imposes an impossible burden on a treble damage plaintiff. At best the present new trial order invites a new appeal to find out what it means which can only be had after the completion of a trial on the damage issues. No litigant or counsel could ever outlast such an interminable trial and appellate procedure. This sort of judicial process rivals Dickens' account of *Jarndyce* v. *Jarndyce*.

The order of the court below apparently would limit proof of the loss of profit to that which could be allocated to specific acts within the damage period. As this Court has already held in the instant case and in *Bigelow*, petitioner as a matter of law is not limited to the so-called "overt act" rule in proving damages.

This Court also expressly so held in *Continental Ore Co.* v. *Union Carbide & Carbon Corp.*, 370 U. S. 690, 698, 699 (1962). The Court reiterated: ". . . 'and in a case like the one before us, the duty of the jury was to look at the whole picture and not merely at the individual figures in it.' . . ."

The attempt by the court below to limit petitioner's damage proofs to specific items of damage allocated to specific overt acts is shown by its statement that the McConnell letter of June 5, 1959 is an act "similar to overt acts occurring in the pre-damage period. Accordingly, Zenith, claiming the right to recover for damage suffered only in the statutory period, is entitled to recover for the

damages it suffered as a result of the June 5 injury" (AA 59).

This resembles the Court of Appeals decision in *Continental Ore Co.* v. *Union Carbide and Carbon Corp.*, 289 F. 2d 86 (9th Cir. 1961) which this Court reversed and there expressly rejected the "overt act" analysis of the court below. This Court said (370 U. S. 690, 698, 699):

> "The Court then examined seriatim the Apex, Van-Ex, Climax, Canadian and Imperial ventures and ruled separately upon the respondents' alleged damage to Continental in connection with each of these episodes. As to Apex and Imperial, it was said that Continental's demands for oxide from respondents were not sufficiently contemporaneous with the failure of these ventures to subject respondents to liability. . . .
>
> It is apparent from the foregoing that the Court of Appeals approached Continental's claims as if they were five completely separate and unrelated lawsuits. We think this was improper. In cases such as this, plaintiffs should be given the full benefit of their proof without tightly compartmentalizing the various factual components and wiping the slate clean after scrutiny of each. '. . . [T]he character and effect of a conspiracy are not to be judged by dismembering it and viewing its separate parts, but only by looking at it as a whole. . . .'"

This Court has described the exclusion of Zenith from full activity in the Canadian market as follows (AA 18): "Zenith therefore suffered damage during the damage period from having a smaller share of the market than it would have had if the pool had never existed." How much smaller that share was could only be proved by an open market comparison which existed nowhere except in the United States. If Zenith has to prove what specific pool activity caused what lower share of the Canadian market the task would be unending and impossible and the proof

unavailable. This sort of proof requirement would as a practical matter end a treble damage suit arising out of a total or partial exclusion from a market and would give the "green light" to vicious law violation such as the instant record shows. As stated in *Bigelow* the more complete the market exclusion the less chance there would be of any recovery at all.

In the instant case there is no evidence that petitioner's damage was caused by anything other than the illegal patent pool.

This Court says (AA 24):

> ". . . the injury alleged by Zenith was precisely the type of loss that the claimed violations of the antitrust laws would be likely to cause."

We submit, therefore, that it is impossible to reconcile the opinion of this Court with the new trial order directed by the court below and that therefore the court below had no authority to enter the same. See this Court's opinion in *Re Sanford Fork & Tool Co.*, 160 U. S. 247, 255 (1895).

(b) The Exclusion by the Court Below of Any Consideration of the Tolling Statute Is Clear Error.

Not only did the court below err in granting a new trial but its order precludes the assertion of a statutory tolling of limitations. It did this by asserting (1) that tolling was not pleaded by petitioner and (2) that tolling had no merit because of its decision in the *Sun Theatre* case, 213 F. 2d 284, 292, holding that the statute cannot be tolled except against defendants in a government suit. We have answered these contentions at pp. 35-37 of our main brief and that argument need not be repeated here.

It is conceded by respondent (Res. br. 45) that if the tolling statute is applicable it would "enable Zenith to rely upon conduct going back . . . to November 24, 1954, four years prior to the commencement of the government's case against General Electric." This would not only enlarge Zenith's damage period but would make evident the specious character of the argument advanced by respondent about a "mature market."

It is further argued at page 44 of respondent's brief that petitioner could not plead tolling because "it would have been necessary to explain to the trial court why it chose to wait *over three years* after the filing of its answer to file its claim for damages." It is apparent that the three years referred to covered lost profit accruing after the answer was filed thus increasing Zenith's claim for damages to include damage that had not accrued at the date of its answer.

We have already shown in our main brief (p. 36) that Zenith was not obligated to plead tolling in anticipation of a possible limitations defense which actually was never raised until a year and a half after trial. Zenith's counterclaim made clear that Zenith was claiming damages based on exclusion from the Canadian market both before and after the date of its answer to respondent's complaint. See discussion p. 37, *supra*.

(c) The April 5, 1965 Judgment Should Be Reinstated.

The net result of the present disposition of the case by the court below is to destroy petitioner's judgment *and possibly its supersedeas bond as well* and to compel petitioner to try the damage issue all over again on irrelevant affirmative defenses under restrictions inconsistent with the opinion and mandate of this Court.

In *Perkins* v. *Standard Oil Co.*, 395 U. S. 642, 650 (1969), just as here, the Court of Appeals vacated a judgment for a treble-damage plaintiff and granted a new trial. This Court reversed the grant of a new trial and reinstated the judgment, saying:

> "We therefore see no need to prolong this litigation which began nearly 10 years ago. The jury's verdict and judgment should be reinstated."

In *Bigelow* the judgment entered in the District Court was reinstated by the mandate of this Court, after this Court had reversed the opinion of the Court of Appeals for the Seventh Circuit holding the "fact of damage" had not been proved. 327 U. S. 251, 266.

This case, which has been in progress for over eleven years, involves the most flagrant forms of the abuses condemned by the decisions of this Court in prior patent pooling cases. In case after case the Court has made clear that Section 1 of the Sherman Act prohibits any concerted acts of patentees to restrain competition. *Timken Roller Bearing Co.* v. *United States*, 341 U. S. 593 (1951); *United States* v. *National Lead Co.*, 332 U. S. 319 (1947); *United States* v. *Singer Mfg. Co.*, 374 U. S. 174, 196-197 (1963).

The classic statement of the restraint inherent in this kind of patent pool is that of Judge Rifkind in *United States* v. *National Lead Co.*, 63 F. Supp. 513, 523 (S. D. N. Y. 1945), aff'd 332 U. S. 319 (1947) as follows:

> "To have access to the patents of the combination, the stranger must not only have the consent of the member of the combination in whose 'territory' he would operate, but he must adhere to the principles of the combination. The cornerstone of the system was the private regulation of international trade. *The suppression of competition was the cement which held the superstructure in place.*" (Italics ours)

Here the respondent's conduct was not inadvertent. It was continued in the face of numerous government prosecutions involving this very pool,[4] and in the face of the settlement of Zenith's litigation with RCA, General Electric and Western Electric.[5] During the pendency of this case respondent re-asserted its intention to remain in the pool. Hazeltine's counsel, Dodds, when cross-examined in January, 1962 stated (A 178-9):

> "Q. You knew something was going on in the way of an attack by American Companies against that Pool, didn't you?"
> "A. Yes."
> "Q. You knew that for a long time?"
> "A. Yes."
> "Q. You still stayed in the Pool?"
> "A. Most definitely, and we intend to continue to stay in the Pool."

In view of this deliberate and flagrantly illegal conduct we submit that the respondent should not be relieved of the consequences of its wrongdoing by the patently erroneous grant to it of a new trial on the damage issue. As a practical matter, the decision of the court below unless reversed makes the treble damage liability of respondent immune from any effective relief to petitioner.

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4. *United States* v. *General Electric Company, Westinghouse Electric Corporation and N. V. Philips-Gloeilampenfabrieken*, 1962 Trade Cases ¶¶ 70546, 70428, and 70342 (S. D. N. Y. 1962); *United States* v. *Radio Corporation of America*, 1958 Trade Cases ¶ 69164 (S. D. N. Y. 1958); *United States* v. *Radio Corporation of America*, 1932-1939 Trade Cases ¶ 55,015 (D. C. Del. 1932).

5. *R.C.A.* v. *Rauland Corp. & Zenith Radio Corp.*, Civil Action No. 48 C 1818 (N. D. Ill., E. D.) (A 2701, 2726).

CONCLUSION.

For the reasons given here and in our main brief the opinion and judgment of the court below should be reversed and the judgment entered by the District Court on April 5, 1965 reinstated.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970.

No. 80

ZENITH RADIO CORPORATION, A CORPORATION,
Petitioner,

vs.

HAZELTINE RESEARCH, INC., A CORPORATION,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

REPLY BRIEF OF HAZELTINE RESEARCH IN RESPONSE TO ZENITH REPLY BRIEF

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OCTOBER TERM, 1970.

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Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

REPLY BRIEF OF HAZELTINE RESEARCH IN RESPONSE TO ZENITH REPLY BRIEF

The reply brief filed by petitioner Zenith asserts a number of new contentions and cases, which should have been raised, if at all, as part of Zenith's main brief. Zenith has also re-tailored a number of its old arguments into a new form. We believe it would be helpful to answer these new matters now, rather than to attempt to do so in the time available for oral argument.

Zenith's reply brief also suggests a degree of complication which does not exist. The plain facts are: (a) the original Canadian award was based on Zenith's contention that the conduct of the Canadian patent pool for many years prior to and during the four-year damage period had interfered with Zenith's development of a market, sales and profits; (b) Zenith's damage claim therefore included the

profits it would have realized had it entered the four-year period with a mature or fully established market (a 16% share as to television and 13% share as to radio instead of its actual market share of 3% and 4% respectively); (c) this Court ruled in its previous opinion that a portion of the award was "necessarily" based on pre-damage period conduct; (d) on remand the Court of Appeals decided that the statute of limitations and the 1957 releases barred Zenith from recovery of those damages resulting from pre-damage period conduct; and (e) the Court of Appeals therefore ordered a remand so that there might be an award excluding damages based on pre-damage period conduct and limited to the damages suffered by Zenith resulting from the operation of the Canadian patent pool during the damage period.

I. ZENITH'S PROPOSED DEFINITION OF "ACCRUAL" OF A CAUSE OF ACTION UNDER SECTION 4B OF THE CLAYTON ACT WOULD CONSTITUTE A DETRIMENT TO THE ENFORCEMENT OF THE TREBLE DAMAGE REMEDY.

The substance of Zenith's contention is that—irrespective of when the plaintiff's rights are invaded by illegal damage-causing conduct which will also inevitably result in future lost profits—the plaintiff's cause of action for such lost profits does not accrue until after the time has expired during which the lost profits would have otherwise been realized (Z. Rep. Br. 4-17).[1] Zenith makes this contention with the hope of rescuing the millions of dollars obviously included in the original award as to Canada of almost $19

1. In this brief we use the same abbreviations as set forth at footnote 1, page 2 of HRI's answering brief. In addition, we refer to Zenith's reply brief as "Z.Rep.Br." and to HRI's answering brief as "HRI Br." Where emphasis appears in quotations in this brief, it has been supplied by us unless otherwise indicated.

million which, as this Court pointed out, included damages which were "necessarily" based on Canadian pool conduct occurring prior to the four-year statutory period (AA. 16; 395 U.S. at 116-17).

Zenith first seeks to create an argument out of the fact that the consistent line of decisions relied upon by the court below were, with one exception, before the enactment or effective date of the federal statute of limitations providing a uniform four-year period (15 U.S.C. 15b). Zenith contends that since most of the cases relied upon by the court below apply state statutes of limitations, the ruling in those cases that a cause of action accrues upon the occurrence of the damage-causing illegal conduct is "not determinative or even persuasive" (Z. Rep. Br. 6). This argument has no merit and Zenith did not even raise the point in its main brief or petition for certiorari.[2]

In the first place, although a number of the cases cited did involve state statutes of limitations, it is clearly established that the determination of when the cause of action accrued was a matter for federal law. As Judge Wyzanski pointed out in *Momand* v. *Universal Film Exchange, Inc.*, 43 F. Supp. 996, 1006 (D.C. Mass. 1942):

> "[I]n determining when this plaintiff's causes of action accrued, the law which governs is the law of the United States which gives the private right to sue for damages suffered from violations of the antitrust laws. On this point Massachusetts or Oklahoma law is not controlling."

See also *Muskin Shoe Co.* v. *United Shoe Machinery Corp.*, 167 F. Supp. 106, 109-11 (D.Md. 1958); *Hanover Shoe, Inc.*

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2. This contention is particularly difficult to understand since the *Hanover* case and the *Delta Theaters* case cited by Zenith (Z. Rep. Br. 9, 14) involved the application of state statutes of limitations.

v. *United Shoe Machinery Corp.*, 245 F. Supp. 258, 294-95 (M.D. Pa. 1965), *aff'd*, 377 F.2d 776 (3rd Cir. 1967), *aff'd*, 392 U.S. 481 (1968); *Sandidge* v. *Rogers*, 167 F. Supp. 553, 556 (S.D. Ind. 1958).

Secondly, it is a well established principle of statutory construction that the Congress in adopting legislation using certain terms is presumed to be aware of prior judicial construction of those terms.[3] Thus, when it adopted the present statute of limitations (for the purpose of establishing a uniform period of limitations) which bars all actions not commenced within four years "after the cause of action accrued," Congress must be presumed to have done so in light of the consistent prior holdings of the federal courts as to when such a cause of action accrues.

Thirdly, contrary to Zenith's assertion, there are a number of cases specifically applying the federal statute of limitations which have followed exactly the same rule as the Court of Appeals below with respect to the time of the accrual of the cause of action. See, *e.g.*, *Laitram Corp.* v. *Deepsouth Packing Co.*, 279 F.Supp. 883, 887-88 (E.D. La. 1968); *Sherman* v. *Goerlich's, Inc.*, 238 F.Supp. 728, 730 (E.D. Mich. 1963), *aff'd*, 341 F.2d 988 (6th Cir. 1965); *Fleischer* v. *A.A.P., Inc.*, 180 F.Supp. 717, 723-24 (S.D.N.Y. 1959); *Garelick* v. *Goerlich's, Inc.*, 323 F.2d 854, 855-56 (6th Cir. 1963); *Peto* v. *Madison Square Garden Corp.*, 384 F.2d 682, 683 (2d Cir. 1967). These cases not only involve the federal statute of limitations, but they cite and rely upon the leading cases cited by the Court of Appeals below.

Zenith's other attempts (Z. Rep. Br. 12-13) to distinguish

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3. United States v. Ryan, 284 U.S. 167, 174-75 (1931); Shapiro v. United States, 335 U.S. 1, 7, 20 (1948), *reh. den.*, 335 U.S. 836 (1948); Sherman v. Hamilton, 295 F.2d 516, 522 (1st Cir. 1961), *cert. den.*, 369 U.S. 820 (1962).

the cases cited by the court below and in our brief are equally without merit. The purported distinctions do not affect the applicability of the decided cases. In fact, all of the Courts of Appeals which have considered the issue have come to the same ultimate conclusion: the continued suffering of damages *from past conduct* does not toll the statute of limitations or create a new limitations period; instead, the cause of action *accrues* and the limitations period runs from the time of the invasion of plaintiff's rights, as to both past and future damages flowing from such invasion (HRI Br. 35-38, 40-42).

Also new is Zenith's reliance upon *Highland Supply Corp.* v. *Reynolds Metals Co.*, 327 F.2d 725 (8th Cir. 1964), and district court decisions in Louisiana and New Jersey. Although Zenith now asserts that the decision below is "directly contrary" to the *Highland Supply* decision (Z. Rep. Br. 14) and that the district court decisions it cites are better reasoned (Z. Rep. Br. 13, 15), it did not mention any of these cases in its petition for certiorari or its main brief. Moreover, the *Highland Supply* case is not in conflict with the decision of the court below, and the district court opinions which Zenith cites, if construed as urged by Zenith, at best represent a distinct minority view not followed by any Court of Appeals or any other district court (see pp. 7-8 *infra.*).

The *Highland Supply* case involved a motion to dismiss the complaint. The complaint claimed damages for the "effects of (Reynolds') *acquisition and subsequent actions*" including alleged price fixing (327 F.2d at 727; emphasis by the court). The district court had dismissed the complaint with prejudice because the acquisition and the *first* price fixing had occurred more than four years prior to bringing the complaint. The Court of Appeals reversed on

the ground that the complaint revealed the possibility of invasions of rights within the limitations period, saying:

> "Irrespective of the date of 'acquirement' of Arrow by Reynolds, or the *first* 'price-fixing' date as considered by the District Court, we must rule that the instant complaint reveals facts as to abuse of 'monopoly power' which under proper showing, *injury and damage* to appellant's business might possibly be established *within* the limitation period. . ." (327 F.2d at 732).

While the court did say that the cause of action arises when the "damage" occurs, the remainder of the opinion makes it clear that the court was referring to injury or damaging impact and was *not* saying that a new cause of action arises each day merely because the plaintiff continues to suffer "damages." In fact, the court in *Highland Supply* not only applied the same rule as the Court of Appeals here, but cited with approval the same cases which were cited by the Seventh Circuit here, *i.e., Momand* (First Circuit), *Crummer* (Fifth Circuit), and *Steiner* (Ninth Circuit):

> "It is existence of monopoly power and the *exertion thereof* on the business of a competitor, in a relevant market, that gives rise to such a claim. Lawlor v. National Screen Service Corp., 238 F.2d 59 (3 Cir. 1956). Such right of action may arise from day to day. Steiner v. 20th Century-Fox Film Corp., 232 F.2d 190 (9 Cir. 1956) and cases there cited. It is well settled that where a private cause of action under the antitrust law is based upon a *continuous invasion* of one's rights, his cause of action accrues from day to day *as his rights are invaded to his damage.* Momand v. Universal Film Exchanges, 43 F.Supp. 996, 1006 (D.C. Mass. 1942), aff'd 172 F.2d 37 (1 Cir. 1948), cert. den. 336 U.S. 967, 69 S.Ct. 939, 93 L.Ed. 1118 (1948); Crummer Co. v. du Pont, 223 F.2d 238 (5 Cir. 1955)" (327 F.2d at 732).

Thus, the court reversed and remanded so that there could be a determination of whether the exertion of monop-

oly power and price fixing by defendant had occurred during the four year period. It did *not* hold that a plaintiff could recover damages suffered in the damage period as a result of alleged antitrust violations occurring more than four years prior to the filing of the complaint.

Two of the district court decisions upon which Zenith now relies are decisions by the same judge in the Eastern District of Louisiana, *Delta Theaters* v. *Paramount Pictures,* 158 F.Supp. 644 (E.D. La. 1958) and *Streiffer* v. *Seafarers Sea Chest Corp.,* 162 F.Supp. 602 (E.D. La. 1958). To the extent that this district judge may be said to have held, as a general proposition, that a new period of limitations starts to run each day damages are suffered, his decisions are inconsistent with the holding of the court of appeals for that very circuit, as made clear in a later decision by another judge in that same district, *Laitram Corp.* v. *Deepsouth Packing Co.,* 279 F.Supp. 883, 887-89 (E.D. La. 1968).

In *Laitram,* the court commented that:

> "The Court of Appeals for the Fifth Circuit apparently has rejected the view that the statute runs on each day's damage as it occurs without regard to when the act causing damage was committed. In Crummer Company v. du Pont, 5 Cir., 1955, 223 F.2d 238, the court said that it was in full agreement with the appellees' theory that '* * * while successive claims would arise out of successive unlawful acts and consequent damages, such claims would have to do, and be concerned with only such successive occurrences and the damages and injuries caused by such acts, and such occurrences would not extend the period of limitation as to earlier acts done and injuries caused thereby' " (279 F.Supp. at 888-89).

The other district court case relied upon by Zenith was *Schenley Industries, Inc.* v. *N.J. Wine & Spirit Wholesalers*

Assoc., 272 F.Supp. 872 (D. N.J. 1967), where the district court said that a plaintiff could recover damages even though caused by acts occurring prior to the period of limitations. However, this comment—actually a dictum because the court held that the motion to strike would in any event have to be denied on other grounds—was made in reliance on the opinion in *Delta Theaters* v. *Paramount Pictures*, despite the fact that *Delta Theaters*, if so construed, is in conflict with the rule laid down by the court of appeals in its own circuit.

In addition, to the extent that these district court cases hold that the statute starts anew each day damages are suffered, they ignore the express language of the statute. This was made clear in the *Laitram* case. Sustaining a statute of limitations defense, the court pointed out that to permit recovery of all damages occurring within four years of the filing of suit, irrespective of when the illegal conduct took place, would "require distortion of the statutory requirement that the action must be commenced within four years after the cause of action *accrued*" (279 F.Supp. at 889; emphasis by the court). Continuing, the court said:

> "These words might be ambiguous to the layman; they should speak with absolute clarity to the lawyer: they require that any suit be commenced within four years after it might first have been brought because that is when the cause of action 'accrued' " (279 F. Supp. at 889).

Zenith also persists in its incorrect interpretation of the *Hanover* case (Z. Rep. Br. 9-11). As we previously pointed out (HRI Br. 39-40), *Hanover* involved recovery of damages suffered by reason of overcharges made during the relevant damage period (1939-1955 by reason of tolling) resulting from continuation of United's illegal lease-only practices. This Court held that failure to sue earlier for

the overcharges made prior to the period did not bar the recovery currently sought based on the overcharges *made within the current period of limitations* (329 U.S. at 502).

Zenith asserts that in *Hanover* this Court's opinion involved recovery for "the 'accumulating' harm" which was "the result in part at least of illegal activity by United prior to the damage period" (Z. Rep. Br. 10), thus insinuating that this Court approved an award based in part on pre-limitations acts. This contention is completely unfounded, as indicated by this Court's comment that:

> "Our conclusion is that Hanover proved *injury and* the amount of its *damages* for the purposes of its treble-damage suit when it proved that United had *overcharged* it *during the damage period* and showed *the amount* of the overcharge" (392 U.S. at 494).

Zenith misreads the Third Circuit's opinion when it asserts that the "argument relied on by the court below was termed an 'affront to reason' in the supplemental opinion" of the Third Circuit in *Hanover* (Z.Rep.Br. 9). A reading of the entire paragraph, of which Zenith quotes only a part, makes it clear that the "affront to reason" was the notion that the failure to sue earlier would bar *all* subsequent actions, even one based upon illegal conduct within the statutory period:

> "The rule applicable to the facts in this case is that where the repeated and measurable invasion of a plaintiff's rights occurs both outside the statutory period and also within it, the fact that some of the injury and damage occurred outside the statutory period does not affect the plaintiff's right to recover *for the separate invasion of its rights which occurred within the period.* Indeed, any other rule would be an *affront to reason,* for it would require the conclusion that injury and damages which were inflicted, as in this case, in 1955, by *concrete and specific business transactions,* were

> barred by the statute of limitations as long ago as 1918 or even earlier, because of similar but not identical *conduct*" (377 F.2d at 795).

Thus, the Third Circuit, as the Seventh Circuit in the instant case, *distinguished* between "invasion of rights" which occurred "outside the period" and such invasions which "occurred within the period."

Zenith bases its contention that the cause of action does not accrue at the time of the illegal conduct upon the erroneous argument that a treble damage plaintiff can never sue for future damages flowing from past conduct. However, none of the four cases which Zenith cites (the latter three for the first time) supports Zenith's contention (Z. Rep. Br. 9). In fact, the courts in each of those cases stated exactly the opposite. In *Connecticut Importing Co.* v. *Frankfort Distilleries,* 101 F.2d 79, 81 (2d Cir. 1939), the court held that recovery could not be based on future *acts,* saying "[d]amages which accrue after the suit is brought cannot be recovered in the action *unless they are the result of acts done before the suit was commenced*" (101 F.2d at 81).

In *Lawlor* v. *Loewe,* 235 U.S. 522, 536 (1915), which we had previously cited (HRI Br. 41), Mr. Justice Holmes very clearly stated that the plaintiff *can* recover future damages incurred subsequent to the filing of his action if those damages "were the consequence of acts done before and constituting part of the cause of action declared on" (235 U.S. at 536).

Flintkote Co. v. *Lysfjord,* 246 F.2d 368, 396 (9th Cir. 1957), *cert. denied,* 355 U.S. 835 (1957), held only that a treble damage plaintiff could not recover for damages resulting from wrongful *acts* committed subsequent to the filing of the complaint:

> "Two well-settled propositions of law govern the determination of this issue. Succinctly stated, they are, that a plaintiff is entitled to recover all damages for injuries proximately caused by wrongful acts committed *prior* to the filing of the action; and conversely, a plaintiff is not entitled to recover damages for injuries resulting from wrongful acts committed *subsequent* to the filing of the action. The time of the wrongful act controls the measure of damages" (246 F.2d at 394; emphasis by the court).

Volasco Products Co. v. *Lloyd A. Fry Roofing Co.*, 308 F.2d 383, 396 (6th Cir. 1962), cited as a "Cf" citation by Zenith, held that a plaintiff is entitled to recover future damages "proximately caused by the wrongful and illegal acts committed by the defendant before the complaint was filed."

Zenith also asserts that *Momand* v. *Universal Film Exchange, Inc.*, 43 F. Supp. 996 (D.C. Mass. 1942) (which we cited, HRI Br. 36, 40-41) "supports the position taken by petitioner here" (Z. Rep. Br. 13). Nothing could be further from the truth. In a situation where the plaintiff alleged continuous violations of the antitrust laws and invasions of plaintiff's rights right up to the filing of the complaint, the district court held that:

> "Each time the plaintiff's interest is invaded by an act of the defendants, he has a new cause of action. For that particular invasion he is at once entitled to recover as damages, *not only for the injuries he suffers at once, but also for those he will suffer in the future from that particular invasion*, including what he has suffered during and will suffer after the trial" (43 F.Supp. at 1006).

Zenith's "position" is *directly contrary* to the above ruling by Judge Wyzanski, and yet Zenith has the temerity to assert that *Momand* supports its position.

The doctrine Zenith now seeks to devise is also in *direct conflict* with well established principles of the law of damages. While future damages from past wrongs may not be based on speculation or "guesswork," a wronged plaintiff in tort, contract or other cases is not limited to past damages. He may also recover those future damages (including future profits) which he could with reasonable certainty anticipate suffering, subject to providing a reasonable basis for their computation.[4]

Zenith's position is not only incorrect on the basis of the decided cases, but, if adopted, it would constitute a major impediment to the effectiveness of the treble damage remedy. The adoption of such a doctrine would *limit* treble damage plaintiffs to recovery for past damages—it would *deprive* treble damage plaintiffs of the rights which other tort claimants have to sue for future damages reasonably anticipated to result from past wrongs—and thus it would require the treble damage plaintiff to sue *again and again*, year after year, for damages resulting from past acts. It is difficult to envision any suggestion *more detrimental* to the enforcement of the antitrust damage remedy or more likely to clog the federal courts with repeated litigation on the same subject matter.

The newly advanced assertion of "three things" which allegedly prevented Zenith's cause of action for the dam-

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4. See, *e.g.*, Palmer v. Connecticut Ry. Co., 311 U.S. 544, 559-562 (1941) (cases cited include Story Parchment Co. v. Paterson Co., 282 U.S. 555, 563); Southwestern Brewery v. Schmidt, 226 U.S. 162, 169 (1912) (Op. Mr. Justice Holmes—damages "reasonably certain to be suffered in the future"); Pierce v. Tennessee Coal & Railroad Co., 173 U.S. 1, 16 (1899); A.H. Bull Steamship Co. v. Ligon, 285 F.2d 936, 938 (5th Cir. 1960); Moe Light, Inc. v. Foreman, 238 F.2d 817, 818 (6th Cir. 1956).

at issue here[5] from accruing in May, 1959 (Z. Rep.) is without merit: Contention No. 3 that the Canadian "had to be in operation during the time of the entire ıge period" is wrong on its face. The issue here is her in May 1959 Zenith could have sued for future ipated damages based on *prior* conduct. The subse- t existence or non-existence of the pool is totally irrele- to that issue.

nith's contentions that it *could not* sue for the four s' damages until June 1963 because (1) it must actually been in business or prepared to engage in business in ıda during the four-year period, and (2) it *had to have* S. profit comparison actually covering the four-year ɔd to prove damages, are similarly without basis. Zenith amply demonstrated by May 1959 by its entry into the ket in 1958 that it was prepared to engage in business anada (Finding XXX, A. 2905).[6] And Zenith's sugges- that a "comparable profit comparison" in the U.S. ring the damage period was the *only possible way* of ıating damages rings particularly false in view of th's repeated extreme assertions elsewhere in this liti-

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The only damages *at issue* here are the profits Zenith lost in amage period as a result of having been excluded or inter- with prior to May 22, 1959. The right of Zenith to collect amages it suffered in the period as a result of the pool's con- l operation *during* the period is not questioned and in fact is ssly recognized by the court below.

Zenith's references to this Court's opinion as to England and ralia (Z.Rep.Br. 6) are irrelevant. This Court pointed out that nly had Zenith not been in business in England and Australia any, many years, but its failure to enter the markets, either g or before the four-year period, was due to governmental ations and economic factors rather than patent pools (AA. ; 395 U.S. at 125-29).

gation as to liberality permitted in the proof of the amount of damages.[7]

Finally, Zenith concludes its section on the statute of limitations with highly inaccurate statements concerning a recent decision of the Seventh Circuit in *Baker* v. *F&F Investment Co.*, 420 F.2d 1191 (7th Cir. 1970), decided three months after the decision in the instant case, and participated in by two of the panel members in the instant case (Z.Rep.Br. 16-17). Zenith asserts that in *Baker* the Court of Appeals below "has since tacitly conceded its error" in the instant case, and that *Baker* "is in direct conflict with the decision of the court below . . . in its holding [in *Baker*] that damage causing acts outside the damage period, i.e., the execution of the installment contracts, can give rise to a suit for damages sustained within the damage period" (Z.Rep.Br. 16-17). This is a completely inaccurate representation of what the Seventh Circuit held in *Baker*.

In *Baker* the Seventh Circuit had before it an appeal from a district court decision which denied a motion to dismiss on the ground that some damage causing conduct occurred within the period of limitations, *i.e.*, the continued enforcement of the alleged "unlawful scheme" consisting of "efforts to collect on the contracts" and "actions instituted to evict [plaintiffs] from the homes they contracted to purchase" (300 F. Supp. at 220). In affirming, the Court of Appeals held that it was proper to deny the motion to dismiss because the complaint had alleged "wrongs" committed by defendants which occurred within the limitations period (420 F.2d at 1200), the court commenting that:

"[T]he touchstone of our inquiry must be the nature

7. In fact, Zenith had available in 1959 statistics concerning its experience during the first four years of its entry into the United States' television market (1949-52), which showed a market share ranging from about 5% to 6% (Offer of Proof, Para. V, A. 3564).

> and extent of defendants' behavior, not the duration of plaintiff's injury" (420 F.2d at 1200).

Thus, the Court there applied the exact same principle which it applied in the instant case.

Indeed, exactly contrary to Zenith's assertion that in *Baker* the Seventh Circuit "tacitly conceded its error" in the instant case, the decision in *Baker* is four-square with the decision below in the instant case. The court itself said:

> "As in Hazeltine Research, Inc. v. Zenith Radio Corporation, 418 F.2d 21 (7th Cir. 1969), the limitations periods commence to run from the last overt act of the conspiracy, permitting plaintiffs to recover 'for damages suffered within the damage period as a result of an overt act repetitious of the unlawful pre-[limitation] periods acts occurring in the damage period' (418 F.2d at p. 25)" (420 F.2d at 1200).

The petition for certiorari in the *Baker* case was denied by this Court on October 12, 1970 (39 U.S.L.W. 3146).

The Court of Appeals was correct in determining in the instant case that Zenith is barred from recovering damages which it may have suffered during the damage period by reason of conduct of the Canadian pool occurring before the period of limitations. The cause of action for such damages had accrued before May 22, 1959, and thus is barred by 15 U.S.C. §15b. Zenith's right to recovery is limited to damages flowing from damage period conduct.

II. ZENITH'S ATTACK ON THE RELEASES HAS NO MERIT.

Zenith's reply brief at pages 17-26 attempts to blunt the effect of the September 1957 releases by several new or restated arguments:

(1) In sub-section (c) at pages 21-26, Zenith advances for the first time the erroneous contention that the releases given to RCA and others *did* reserve rights against HRI. Zenith's tortured reasoning is that the inclusion of parent and subsidiaries in the releases, as authorized by the settlement agreement (PX 48, A. 2783), somehow constituted a reservation of rights against alleged co-conspirators. The complete lack of merit in this argument is shown by the fact that Zenith's counsel in this litigation, who also acted on behalf of Zenith in the negotiations and signed the settlement agreement (PX 48, A. 2786) which led to the 1957 releases, expressly admitted in open court that HRI *is* entitled to the benefit of the releases, contending only that they do not apply to future damages:

> "The Court: What is your reply to his contention that the 1957 release also released Hazeltine from anything prior to the date of the release?
>
> "Mr. McConnell: Well, any money damages which had accrued prior to 1957, if they were joint tortfeasor, which we allege that they were, would be released, but we are not asking for damages prior to 19—
>
> "The Court: You have answered my question.
>
> "Mr. McConnell: But not in the future, and I have got a case squarely on that. There is no question about it at all. You cannot release torts which arise in the future. It is against public policy and it is void" (A. 3035).

In the face of this unequivocal admission by Zenith's attorney, Zenith cannot now in good faith argue that the release was intended to and did contain an express reservation of rights against HRI.

Moreover, the inclusion of parent and subsidiaries cannot be construed as an "express reservation" of rights against others. The *Twentieth Century-Fox* case, cited by

Zenith (Z. Rep. Br. 23-24) as "succinctly" stating the rule that "joint tortfeasors are released *unless* an express contrary intention is demonstrated" involved a release which, like the one here, extended to the releasee and "its past and present *parents, subsidiaries* and *affiliates*, predecessors, successors . . ." (351 F.2d at 927 n.1). Obviously that court did not consider this express inclusion of such related companies to be an expression of reservation of rights against others, for it held the release "incorporated no express reservations of any kind" and that the releasees' alleged co-conspirators *were* entitled to the benefit of the release (351 F.2d at 931).

In addition, there was an obvious reason for including parent and subsidiaries in the Zenith releases wholly unrelated to any claim based upon their being co-conspirators. The settlement agreement provided for a "general release." It thus included not only the claims in the litigation, but all claims generally which Zenith might have. Thus, although the parents and subsidiaries of RCA, GE and Western Electric would, if co-conspirators, have the benefit of a release of the claims in litigation even if not mentioned, in order to give them the benefit of a general release of all other claims, naturally they would have to be named.

Zenith's argument is an afterthought. Although HRI claimed the benefit of the releases in argument before the trial court on its motion to reopen the proofs and at all subsequent stages of this litigation, Zenith's new argument was never advanced in the district court, or in the briefs or arguments to the Court of Appeals on the appeal to that court. It was not asserted in the briefs or arguments to this Court during the original appeal, or in Zenith's briefs filed in the Court of Appeals prior to the Court of Appeals' most recent decision. No mention of it appeared in the petition for certiorari or in Zenith's reply brief on the petition for certiorari, and it was not asserted in Zenith's brief on the merits on this appeal. The fact that this point was not once

even mentioned but instead was raised for the very first time in the reply brief here shows that it was not only an afterthought but that it could not have been the intention of Zenith that the language of the settlement agreement or the releases constituted an express reservation of rights as to HRI. Had that been the case, it would have been the very *first* thing Zenith would have raised on the release question.

(2) The decision of the court below and HRI's argument on the release issue are based upon two fundamental propositions of federal law: (A) absent an express reservation of rights, a release of one co-conspirator releases all alleged co-conspirators; and (B) the release of future damages flowing from past acts deprives the person giving that release of the right to later sue for those future damages. Not being able to deny that the cases we cited stand for the propositions for which they are cited, Zenith now resorts to the argumentative technique of saying that the cases cited for proposition A do not support proposition B, and that the cases cited for proposition B do not support proposition A. Specifically, we cited *Twentieth Century-Fox, Dura Electric Lamp* and other cases for the rule uniformly applied by the federal courts in antitrust cases that the release of one alleged co-conspirator releases all in the absence of an express reservation of rights against others (HRI Br. 29). We cited certain other cases on page 24 of our brief in which releases, similar to the one given here, had applied to bar not only the damages up to the date of the release but also *future damages* resulting from conduct occurring prior to the release.[8] At pages 19-20 of its

8. There are two recently reported cases which similarly held that releases having language substantially identical to that of the releases involved here barred recovery of damages suffered after the release as a result of conduct prior to the release. Sears, Roebuck & Co. v. Jardel Co., 421 F.2d 1048, 1053 (3d Cir. 1970); Green v. Valve Corp. of America, 428 F.2d 342, 345 (7th Cir. 1970).

reply brief, Zenith says that the *Twentieth Century-Fox* and *Dura Electric Lamp* cases did not involve future damages and that the cases cited on page 24 of our brief did not involve the doctrine of release of joint tortfeasors. Zenith's response cannot alter the fact that the propositions relied upon by the Court of Appeals below are settled law in the federal courts.[9]

(3) As to Zenith's contention that the September 27, 1957 releases could not release future damages resulting from conduct prior to the releases because such a cause of action "did not even exist until petitioner sustained damages in the form of lost profits" (Z.Rep.Br. 18), the fact is that:

(a) a cause of action *does* exist for future damages which will result from past conduct (HRI Br. 40-42);

(b) even if it were to be assumed (incorrectly) that a cause of action for future damages resulting from past acts arises from time to time only as the calendar turns after the occurrence of the damaging conduct, nevertheless the releases would apply, for they specifically released all "causes of action" which Zenith "*hereafter can, shall or may have* for, upon or by reason of any *matter, cause or thing* whatsoever from the beginning of the world *to* the day of *the date* of these presents . . ." (HRI Br. 26-27, A. 3051-52); and

(c) if Zenith's contention were correct, Zenith could have sued RCA, GE and Western Electric in 1963 for

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9. Contrary to the impression Zenith apparently seeks to create (Z.Rep.Br. 25), this Court in Aro Manufacturing Co., 377 U.S. at 501, cited the rule of the Restatement of Torts that a general release of one alleged co-conspirator releases all in the absence of an express reservation of rights against others as representing the "overwhelming weight of scholarly authority."

> loss of profits during the 1959-1963 period resulting from a lack of market build up by reason of pool interference prior to September 1957, which would be directly contrary to the express language of the releases (HRI Br. 27).

In asserting the alternative theory that the release of future damages from past acts would be contrary to public policy, Zenith persists in attempting to obscure the difference between the release of a claim for damages based on *past conduct* and an attempted release of liability for *future conduct* constituting a violation of the antitrust laws. Zenith cites *Fox Midwest Theatres* v. *Means,* 221 F.2d 173 (8th Cir. 1955) (Z. Rep. Br. 19), in which the court said:

> "Any contractual provision which could be argued to absolve one party from liability *for future violations* of the antitrust statutes against another would to that extent be void as against public policy. . . . [T]he effect of such a release could be to *permit a restraint of trade to be engaged in . . .*" (221 F.2d at 180).

In other words, it would be against public policy to release the effects of *future conduct* because to do so would *authorize a future violation* of the Sherman Act. The 1957 releases cover only past, present and future damages resulting from *prior conduct* "to the day of the date of these presents." They do not release or purport to release any claims based on *conduct* in the future.

In fact, it is Zenith's contention which would be *against* public policy. To hold that a release could not include future damages anticipated to result from prior conduct, would often make it impossible to settle treble damage claims and thus result in increased litigation (HRI Br. 27).

III. ZENITH'S "WAIVER" ARGUMENTS ARE CONTRARY TO THE RECORD AND ITS OWN ADMISSIONS.

The substance of Zenith's various "waiver" arguments appearing at pages 27-32 of its reply brief, have been largely dealt with in our main brief (HRI Br. 49-57). Accordingly we will comment only briefly on some of Zenith's reply brief assertions.

Zenith asserts that at pages 51-55 of its brief HRI has taken a "new approach" with respect to the waiver issue (Z. Rep. Br. 28). At those pages we outlined the sequence of events whereby the trial court had granted leave to HRI to enter the pleas of limitations and release *prior to entry of judgment,* but erroneously rejected the defenses on the merits. These are precisely the same matters previously referred to as showing that these defenses are in the case (*e.g.,* HRI's Reply Brief On Antitrust Claim filed in the Court of Appeals on the first appeal, p. 14; and HRI's brief filed in this Court in opposition to Zenith's Petition for Mandamus, Misc. No. 1338, pp. 22-24).

Zenith refers to the trial court's statement that he did not intend to permit "a second chance" as though this had reference to the issue of filing of the affirmative defenses (Z. Rep. Br. 31). The statement quoted by Zenith (A. 3527) had nothing to do with filing of the affirmative defenses, but was made at the conclusion of the reopening hearings in connection with the damage award as to England and Australia, many months after the court's ruling with respect to limitations and release, and, indeed, after the Canadian aspect of the case was already on appeal.

Zenith asserts that the Court of Appeals "cavalierly disposed of" the waiver issue by concluding that the trial court's ruling as to release and limitations was on the

merits and not on the basis of waiver (Z. Rep. Br. 27). Yet three paragraphs later, Zenith agrees with the Court of Appeals that the decision of the trial court was on the merits, for it says:

> "[T]he *rejection* by the trial court of these defenses *on their merits* was a correct decision . . ." (Z. Rep. Br. 27).

In all its argument on the "waiver" issue, Zenith overlooks the fact that the trial court may in its discretion at any time before entry of judgment excuse a party from failure to plead an affirmative defense in its original answer (see HRI Br. 55-57), and ignores its own prior admission in this Court that the trial court did precisely that:

> "The trial court permitted the filing of the pleas as of a date a year after the trial (A. 3037), and then promptly overruled the motion to dismiss the counterclaim on these grounds (A. 3037)." (Zenith Reply Brief, October Term, 1968, p. 16).

IV. NEITHER ZENITH'S NEWLY ASSERTED "RELATION BACK" CONTENTION NOR TOLLING IS BEFORE THE COURT.

Before dealing specifically with Zenith's contentions with respect to tolling and relation back, it should be pointed out that neither tolling nor relation back would have any effect upon the release defense. No matter when the action was commenced or what the applicable limitations period is, Zenith is barred by the releases from recovering any damages which it suffered after September, 1957 by reason of conduct which occurred prior to September, 1957.

A. Relation Back.

In an attempt to expand the limitations period, Zenith's reply brief asserts a "relation back" argument (Z. Rep. Br.

36-38). Zenith states that the relation back argument was "made at page 35 of our main brief" (Z. Rep. Br. 38), but the fact is that although the argument was there hinted (see HRI Br. 45 n. 25), it first appears expressly in Zenith's reply brief. In any event, this issue is not before the Court.

No issue involving a claimed relation back to the date of the answer was listed in the "Questions Presented For Review" in Zenith's petition for certiorari (Z. Pet. 2-4). Nor does any such issue appear in the rephrased questions listed in Zenith's brief on the merits (Z. Br. 4-6). Under such circumstances the issue is not before the Court (Supreme Court Rule 40(d)(2)). Moreover, no such issue was argued to or decided by the Court of Appeals and has not been briefed by the parties here.

In addition, everything that Zenith has done in this case is inconsistent with its present assertion that the filing date of the counterclaim relates back to the date of the answer. First, in referring to this Court's footnote comment on relation back (Z. Rep. Br. 37), Zenith omits the first sentence of the footnote in which this Court stated that: "The record discloses that Zenith, HRI, and the courts below *all considered* the damage period to be the four years prior to the date on which Zenith filed its counterclaim" (AA. 8 n. 2; 395 U.S. at 108 n. 2). Having repeatedly asserted that the "damage period" was May 22, 1959 to June 1, 1963, Zenith cannot now in good faith assert that the damage period really extended back to April 7, 1956.

Second, to relate back the limitations period to April 1956, for the purpose of claiming damages based on conduct beginning at that time would be in direct conflict with Zenith's motion and sworn affidavit which constituted the basis on which Zenith was granted leave to file its counterclaim three years after its answer. For although the mo-

tion, Crotty affidavit and counterclaim made reference to paragraphs 12 and 13 of the answer, it was expressly stated that the matters or activities for which *treble damages* were claimed were those which had occurred since the filing of the answer (April 7, 1960) (A. 63, para. 2).[10]

Moreover, if the issue of relation back were before the Court, a host of questions would be raised which neither party has ever considered as part of this lawsuit,[11] and which, in fact, discredit Zenith's whole approach to the damage issue in this case. For example, how does Zenith square its contention that its answer filed in 1960 "was the equivalent of a treble damage counterclaim" (Z.Rep.Br. 37) so as to support its relation back argument, with its theory that the counterclaim in this case could not have been filed earlier than 1963? According to Zenith's theory, a treble damage plaintiff is limited to those damages which he has actually suffered at the time of the filing of his action. Thus, if the filing of Zenith's action (*i.e.*, its counterclaim) relates back to the date of the filing of the

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10. The earlier activities would be appropriately referred to in the counterclaim for the purposes of giving background, alleging the existence and character of the alleged conspiracy, and forming basis for injunctive relief, but the reliance on those activities as a basis for the damage claim was clearly negatived (see HRI Br. 44).

11. Neither Bull v. United States, 295 U.S. 247 (1935) nor Cold Metal Process Co. v. E. W. Bliss Co., 285 F.2d 231 (6th Cir. 1960) holds that an antitrust counterclaim, such as Zenith's counterclaim here, should relate back to any earlier answer. The Bull case dealt only with the special defense of recoupment, which by definition is based on a matter arising out of the transaction sued upon and therefore can never be barred if the main action is timely. In Cold Metal, a patent infringement counterclaim was held to relate back to the date of the declaratory judgment *complaint* specifically because both raised identical issues and sought identical relief—a situation not present here.

answer then, under Zenith's theory, Zenith would be limited to those damages which it suffered in the period prior to the filing of the answer in 1960.

Other equally perplexing questions would be presented if Zenith's attempt to salvage the $19 million damage award on the basis of relation back were properly before the Court. For example, if construed to relate a late-filed counterclaim back to the date of the answer so as to negate the statute of limitations, is Rule 15(c) beyond the rule making power of the courts? What is the relationship between Rule 13 which applies to counterclaims, and Rule 15 which applies to amendments in general?[12] All of these matters—which have not even been briefed by either party —are matters which would have to be considered if the question of relation back were before the Court.

B. Tolling.

By merely asserting that its main brief answered the "contentions" of the Court of Appeals (Z. Rep. Br. 43), Zenith leaves unanswered the factors listed in our brief indicating that the statute does *not* provide for tolling as to persons not named in the government case (HRI Br. 46-49). For example, Zenith has no answer to the fact that Congress, having knowledge of the uniform interpretation of the language of the statute limiting tolling to named parties in the government litigation, did not change that language when it amended other parts of the statute (HRI Br. 47-48). Such circumstances have repeatedly been held

12. In Stoner v. Terranella, 372 F.2d 89 (6th Cir. 1967), the court held that Rule 13 is mutually exclusive of Rule 15 and that therefore a counterclaim sought to be added to an answer did not relate back to the date of the answer under Rule 15(c) for purposes of avoiding the statute of limitations.

to indicate that Congress accepted the construction of the statute and intended that it be continued.[13]

We submit that if the law is to be changed to provide for tolling as to parties not named in government litigation, this should be a matter for the Congress, but that in any event the situation here does not present the issue.

V. ZENITH WOULD HAVE THIS COURT IGNORE THE AFFIRMATIVE DEFENSES REGARDLESS OF THEIR MERIT AND REINSTATE THE ORIGINAL JUDGMENT.

Sections II and III of Zenith's reply brief (Z. Rep. Br. 32-46) contain a variety of arguments ultimately aimed at convincing the Court that the original judgment of almost $19 million should be reinstated irrespective of the validity of any of the affirmative defenses.

Zenith's primary argument in section II (Z. Rep. Br. 32-40) and elsewhere in its reply brief (*e.g.*, pp. 11-12, 25-26) is that because a *part* of the Canadian damage award was considered to result from damage period conduct, *the entire amount* of the alleged damages should be awarded to Zenith irrespective of the defenses of release and limitations. This argument is purportedly based upon *Bigelow* (Z. Rep. Br.

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13. Missouri v. Ross, 299 U.S. 72, 75 (1936) (". . . Congress in the face of these decisions has permitted the clause as it now appears in paragraph (6) to stand for many years *without change in its phraseology*, although amending that portion of the Bankruptcy Act in other particulars. This is persuasive evidence of the adoption by that body of the judicial construction."); United States v. Ryan, 284 U.S. 167, 175 (1931); Stonybrook Tenants Association, Inc. v. Alpert, 194 F. Supp. 552, 555-56 (D. Conn. 1961); In the matter of John S. Goff, Inc., 141 F. Supp. 862, 864 (D. Me. 1955).

33-36), but *Bigelow* neither requires nor even suggests such a result.

As this Court commented in its first opinion (AA. 23-24; 395 U.S. at 123-24), the *Bigelow* case enunciated the principles that in treble damage cases, the defendant must bear the risk of uncertainty of proof, that the fact finder may make a "just and reasonable estimate of the damage *based on relevant data*", and that the wrongdoer may not complain that the amount of damages was not precisely established or based on more accurate data which his own misconduct has rendered unavailable (327 U.S. at 264-65). However, this is not a case of uncertainty as to whether or not the original Canadian damage award of $6 million (before trebling) was entirely attributable to damage period conduct. *This Court has already affirmatively held, and Zenith has admitted (Z. Rep. Br. 8), that a portion of that damage award was not due to damage period conduct. Rather, a portion was "shown to be attributable to other causes," namely to pre-damage period and pre-release period conduct*—indeed, a substantial portion because, as this Court pointed out (AA. 16, 395 U.S. at 116), the damage calculation assumed that Zenith but for the Canadian pool's operations prior to the beginning of the period, should have started with a *mature market* position of 16% of the Canadian television market and 13% of the radio market from the very first day of the period rather than its actual shares of 3% and 4%, respectively (see HRI Br. 18-22).

Zenith asserts that HRI has engaged in an "involved and 'metaphysical' argument" concerning the " 'mature market' concept" and that the courts below have found no merit in or refused to follow the concept (Z. Rep. Br. 32). In fact, the concept has been understood and adopted by the trial court (A. 3204), by the Court of Appeals, and by this Court

in its previous opinion (HRI Br. 18-22). Moreover, Zenith conceded that its claimed Canadian damages were calculated on the assumption of a "mature market position" (Z. Br. 25) and its executive vice president Kaplan so testified in this case (A. 3440, 3465). The simple point is that damages cannot be awarded on the basis of profits Zenith claims it would have made in the damage period if it had started the damage period with a 16% market share instead of a 3% market share, because the activities which prevented Zenith from having that market share at the beginning of the damage period occurred more than four years prior to the bringing of the counterclaim and before the releases. Thus, any cause of action based upon those activities was barred by the statute of limitations and the releases.

What Zenith continually seeks to ignore is that the question is *not* whether Zenith's damage evidence and the finding of the trial court are accurate estimates *of what they purport to estimate* (*i.e.*, a mature market share); the question is *whether they estimate the right thing* (HRI Br. 65-66). In fact, on this issue, Zenith repeatedly represents our position as something which it is not.[14]

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14. Zenith asserts that our brief detailed no "record facts" which "negative petitioner's damage computations" (Z. Rep. Br. 3) and again argues that Zenith's evidence on the issue of the amount of damages went in without objection (Z. Rep. Br. 35). Although the admissibility of Zenith's evidence was not objected to, there was substantial countervailing evidence both in the form of direct testimony and cross examination of Zenith's witnesses (see pp. 127-34 of HRI's main brief in the Court of Appeals dated December 21, 1966 and on file with the Clerk of this Court as part of the record on appeal). Moreover, in our briefs on this appeal we have not detailed the evidence in the record which negates Zenith's estimates and calculations as to the amount of damages because, as we have pointed out, the issue here is the correctness of the holding of the Court of Appeals on the statute of limitations and releases.

Our position is *not* that Zenith's damage calculations are erroneous because they merely "assume" a mature market (Z. Rep. Br. 38), nor is it our position that Zenith is foreclosed from recovery because it could not establish factually what a mature market position would have been in Canada (Z. Rep. Br. 35), and we certainly do not contend that the release and limitations defenses here go to the *weight* of Zenith's damage exhibit (Z. Rep. Br. 35). On the contrary, it is our position, and the holding of the Court of Appeals, that the defenses of release and limitations, as a matter of law, prevent the award of damages based upon a mature market position at the start of the damage period *in this particular case* because such a method of estimating damages necessarily includes recovery of damages proximately caused by alleged illegal conduct which occurred prior to the releases and prior to the period of limitations.

All that the Court of Appeals opinion requires is that, where there is alleged illegal conduct both outside the period of limitations and within the period of limitations, the trier of fact should take the conditions *as they actually exist* on the first day of the damage period and then determine, on the basis of available relevant data, the amount of profits the plaintiff would have made thereafter if there had been no illegal conduct after that date. In the instant case that would involve (a) starting with Zenith's actual market share in Canada at the beginning of the damage period (approximately 3% as to television and 4% as to radio) and (b) estimating, on the basis of available relevant data, what share of the market and what profits Zenith would have achieved during the four-year period assuming that no illegal patent pool conduct occurred during the

damage period[15] and (c) making deductions on account of Zenith's actual sales and profits.

Contrary to Zenith's assertions, this method of computing damages would not "destroy" the rights of Zenith or any other treble damage claimant to recover treble dam-

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15. While the question as to what market share Zenith could have obtained during the four-year period under these circumstances is not before this Court, two statements contained in Zenith's reply brief relating to Zenith's experience in Canada are so incorrect and so misleading that we believe they should not go unanswered. First, Zenith points out that it had the same share of the market in Canada in 1959 (3.1%) as in 1963 (3.2%) and asserts that this shows "that faced with pool restrictions Zenith could never improve its market position in Canada" (Z. Rep. Br. 32-33). In fact, Zenith's market share had increased to 4% by 1960, and to 5% by 1961, but dropped off in 1962 as the impact of an unfavorable exchange ratio and additional Canadian tariffs took effect (DX 220, A. 2661; PX 62, A. 2850). Zenith's annual reports for this period showed that having entered the market in 1958, Zenith had "doubled its sales" in 1959 and "achieved a substantial gain in its percentage of industry sales" (A. 2993); in 1960 Zenith "successfully countered the downward industry sales trend . . . and made important gains" (A. 2994); in 1961 Zenith made "gratifying progress during the year selling more television receivers than in the two previous years combined" (A. 2995), but in 1962 the "curbs instituted by the Canadian government" relating to "exchange ratio" and "additional tariffs" presented "serious obstacles" (A. 2850).

Secondly, Zenith asserts that its sales increased during the 1964-1967 period when the trial court injunction was in effect. This same assertion was first made in Zenith's brief in No. 49, October Term, 1968 (pp. 83-84; Appendix B, pp. A. 25-26). As pointed out in HRI's answering brief in No. 49, October Term 1968 (p. 120), the growth in sales volume largely represented Zenith's entry into the Canadian color television market in the 1960's at the same time as other competitors, and apparently the volume of radio and black and white television declined sharply *after* the injunction.

ages (Z. Rep. Br. 40); would not make "the treble damage liability of respondent immune from any effective relief" (Z. Rep. Br. 46); and would not limit recoverable damages to those allocable to "specific, concrete 'overt' acts" (Z. Rep. Br. 41-43). In fact, this is the very basis on which Zenith's witnesses purported to estimate damages for England and Australia, and the very basis on which the trial court purported to make its findings as to the amount of Zenith's damages with respect to those countries (HRI Br. 67-68).

VI. THE PUBLIC INTEREST DOES NOT REQUIRE THE AWARD OF $19 MILLION TO ZENITH.

Zenith closes its reply brief by asserting that HRI has been engaged in "the most flagrant forms of abuses" and in "deliberate and flagrantly illegal conduct," and by implying that the Canadian award of $18,892,173 should be given to Zenith, whether or not it is legally entitled to it (Z. Rep. Br. 45-46). Although this argument itself is not new and we have dealt with it in our main brief (pp. 68-75), the quotation of the testimony of counsel in 1962 was not in Zenith's earlier briefs on this appeal.

It should be obvious from the statements of counsel quoted by Zenith (Z. Rep. Br. 46) that he believed in good faith that the licensing practices of the Canadian pool limiting imports were required and were lawful.[16] Hazeltine Corporation had licensed its patents to the Canadian

16. Canadian law provides that Canadian patents are abused and may be subject to being revoked if licensed to non-Canadian manufacturers to such extent that imports will interfere with the ability of local manufacturers to engage in production reasonably sufficient to supply Canadian demand. See *e.g.*, HRI main brief in No. 49, October Term, 1968, of this Court, pp. 152-54. The cases cited by Zenith as supposedly giving notice that the Canadian pool was unlawful (Z. Rep. Br. 46 n. 4) involved consent judgments, without an adjudication as to whether or not the Canadian pool was unlawful.

pool but was not a member. Neither HRI nor its parent Hazeltine Corporation manufactures radio or television sets, and neither competes with Zenith. There is no way in which the damage to Zenith alleged here could benefit either HRI or Hazeltine Corporation. The sole means Hazeltine Corporation had to benefit from its Canadian patents was through royalties, and neither company would benefit from a restriction on the grant of licenses under those patents. The charges of intentionally illegal conduct thus have no basis in fact.

This Court pointed out (AA. 14; 395 U.S. at 114) that the proof of the *fact* of damage itself was "by no means conclusive" but only established inferentially. The testimony of the same witnesses on whom Zenith relies as to Canada was the purported basis for Zenith's attempt to recover almost $30 million in treble damages as to England and Australia when in fact it had suffered *no* injury with respect to those countries. Under such circumstances, Zenith's contention that it should be granted $19 million on the basis of the public interest rings hollow. Use of the treble damage remedy as a means of antitrust enforcement does not call for the award to a giant of the industry of millions of dollars which the *record shows* it is not lawfully entitled to.

Zenith's suggestion that the litigation must come to an end because it "has been in progress for over eleven years" (Z. Rep. Br. 45), as well as its "public interest" arguments, are in substance the same arguments which it made in opposing all efforts to reopen the original English and Australian awards, which were ultimately found to be completely without basis in fact. Moreover, Zenith has its injunction, and having to wait for its money until the *proper* amount of its damages are determined will certainly cause no injury to Zenith. Indeed, to do otherwise would be contrary to the interests of justice.

CONCLUSION

For the reasons given in our main brief and this reply brief we respectfully submit that the ends of justice require that the judgment of the Court of Appeals be affirmed so that the case may go back to the trial court for a determination of the amount which HRI owes Zenith.

Respectfully submitted,

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Dated October 30, 1970

FILE COPY

Supreme Court, U.S.
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E. ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 80

ZENITH RADIO CORPORATION, A CORPORATION,
Petitioner,

vs.

HAZELTINE RESEARCH, INC., A CORPORATION,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

PETITION FOR REHEARING OF HAZELTINE RESEARCH, INC.

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II. If the Court's holding as to the intended scope of the 1957 releases is considered to be an actual finding of fact, it is in conflict with established legal principles and contrary to the record. 5

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ZENITH RADIO CORPORATION, A CORPORATION,
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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

PETITION FOR REHEARING OF HAZELTINE RESEARCH, INC.

Petitioner Hazeltine Research, Inc. (HRI) respectfully prays for a rehearing on the following grounds:

I. The Court has created and given retroactive effect to a new, conclusive presumption of fact as to the effect of releases, which will have broad application to releases previously given in antitrust and other litigation, will *foreclose* a determination of actual intent, and will in many cases produce a result directly *contrary* to the actual intent of the parties.

II. If the Court's holding as to the intended scope of the 1957 releases is considered to be an *actual* finding of fact, it is in conflict with established legal principles and contrary to the record.

III. The Court has overlooked the fact that the consideration received by Zenith under the 1957 settlement had a value of $45,000,000 (not $10,000,000) and that a portion of that consideration was necessarily in satisfaction of future damages from pre-release acts, so that Zenith will recover the same damages twice.

IV. The unjustifiable impact upon HRI of the erroneous ruling as to the 1957 releases is emphasized by the record in *Zenith* v. *United States,* a recently decided tax case, in which the facts stated by Zenith witnesses are not consistent with the extensive damages awarded against HRI.

I.

The Court ruled that the question whether a release shall apply to joint tort-feasors in an antitrust case shall be determined according to "the intentions of the parties," and that the prior rule that a release runs to joint tort-feasors unless there is an express reservation of rights in the release, no longer shall apply (Op. 24-25).[1] However, rather than providing for a factual determination of intent in the normal manner, this Court instead then created, and gave retroactive effect to, a *new, conclusive presumption of fact* which not only *forecloses* a determination of actual intent, but which will in many cases give an effect to releases which is the *complete opposite of what the parties intended.*

The Court held "The intention of the parties" not to release joint tort-feasors is "absolutely clear" (Op. 25). It reached this conclusion on the *sole ground* that the settle-

[1] Citations to the Court's opinion are abbreviated "Op. .....". All other citations are abbreviated as set forth at footnote 1, p. 2, of HRI's brief.

ment agreement provided that the releases would run to the benefit of "the parent and subsidiaries" of the party receiving the release (Op. 25-26). The Court reached this conclusion (1) despite the admissions of Zenith to the contrary referred to herein (see p. 7 *infra*), and (2) despite the fact that there had been no hearing or opportunity to adduce evidence on the question. The references to parent and subsidiaries *without* reference to joint tort-feasors was held dispositive, making any hearing as to actual intent superfluous—it was *per se* and necessarily *conclusive.*

If it could be said that the reference to subsidiaries and parent corporations creates only a rebuttable presumption of intent which is not conclusive where it can be shown by other evidence that the parties did intend to release co-conspirators, then a hearing should be granted here so that all relevant evidence can be offered and considered.

Since the Court did not order such a hearing, the net effect of the ruling is that any time a settlement agreement or release specifically includes someone other than the principal released party the lower courts *must* hold that the parties intended not to release unnamed co-conspirators or joint tort-feasors and cannot consider any other evidence, no matter how convincing that other evidence might be of a contrary intent. We respectfully submit that this is an error of law having far-reaching and serious repercussions in the administration of justice not only in antitrust cases but in the construction of releases generally.

Aside from its prejudicial effect upon HRI, this new presumption will produce a result *directly contrary* to the actual intent of the parties in many releases heretofore entered into. It is normal practice in antitrust and other litigation to obtain broad, general releases not limited to the claims in suit, and including the corporate family of the

released parties, *i.e.*, "parents, subsidiaries, affiliates, etc."[2] And in the absence of an express reservation of rights against co-conspirators, the repeated holding of the courts in antitrust cases has been that such a release did release unnamed co-conspirators. See, *e.g.*, *Combined Bronx Amusements, Inc.* v. *Warner Bros. Pictures, Inc.*, 132 F.Supp. 24 (S.D.N.Y. 1955) ("the respective subsidiary, parent and affiliated companies"); *Solar Electric Corp.* v. *General Electric Co.*, 156 F.Supp. 51, 56 (W.D. Pa. 1957) ("all its subsidiary and affiliated companies"); *Dura Electric Lamp Co.* v. *Westinghouse Electric Corp.*, 249 F.2d 5, 7 n.2 (3d Cir. 1957) ("all its subsidiary and successor companies"); *Twentieth Century-Fox Film Corp.* v. *Winchester Drive-In Theatre, Inc.*, 351 F.2d 925, 927 (9th Cir. 1965), *cert. denied*, 382 U.S. 1011 (1966) ("parents, subsidiaries and affiliates").

What will happen then to the untold number of releases previously given in which the parties intended that unnamed joint tort-feasors be released and referred to parents and subsidiaries, which reference was not determinative prior to this Court's decision in the instant case? If this presumption is applied retroactively as the Court has done, it will have a far reaching effect in fostering controversy and litigation. For if the presumption is proper, it has equal application in construing releases both in anti-trust litigation and other litigation, and lawyers must so construe it.

We submit that, having rejected the prior generally accepted rule as to the effect of releases on the ground it may not accord with actual intent, it is an *anomoly* to propound and give retroactive effect to a new rule as to presumed

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[2] The obvious purpose of the inclusion of parents, subsidiaries etc., is to give the general release maximum breadth even to claims not in litigation, including claims the releasing party might have against parents and subsidiaries, etc., not based on a claim of co-conspiracy or joint tort.

intent which may not, and in all probability does not, accord with the actual intent of the parties.

II.

If this Court's ruling is considered as a finding of fact, it conflicts both with the record and several recognized legal principles. The first of these principles is that the parties to a transaction are presumed to act in light of the law as it existed at the time[3] and that to construe and know the obligation of a contract we must look to the law in force at its making.[4]

In 1957 the law in antitrust cases was that the release of one alleged co-conspirator, in the absence of an express reservation against others, was a release of all. See, *e.g.*, *Eagle Lion Classics, Inc.* v. *Loew's Inc.*, 121 F.Supp. 128, 129 (S.D.N.Y. 1954), *mod. on other grounds*, 219 F.2d 196 (2d Cir. 1955); *Michael Rose Productions, Inc.* v. *Loew's, Inc.*, 141 F.Supp. 257, 263 (S.D.N.Y. 1956); *Combined Bronx Amusements, Inc.* v. *Warner Bros. Pictures, Inc.*, 132 F.Supp. 921, 922 (S.D.N.Y. 1955); *Solar Electric Corp.* v. *General Electric Co.*, 156 F.Supp. 51, 58 (W.D. Pa. 1957); RESTATEMENT OF TORTS, § 885 at 460-63 (1939); see also *Lysfjord* v. *Flintkote Co.*, 135 F.Supp. 672, 675 (S.D. Cal. 1955), *rev'd on other grounds*, 246 F.2d 368 (9th Cir. 1957);

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[3] *American Security and Trust Co.* v. *Frost*, 117 F.2d 283, 285 (D.C. Cir. 1940), *cert. denied*, 312 U.S. 707 (1941); *Vokal* v. *United States*, 177 F.2d 619, 625 (9th Cir. 1949); *Commissioner of Internal Revenue* v. *Paulson*, 123 F.2d 255, 257 (8th Cir. 1941); *Macias* v. *Commissioner of Internal Revenue*, 255 F.2d 23, 28 (7th Cir. 1958); *In re Shubert's Will*, 10 N.Y. 2d 461, 180 N.E.2d 410, 416 (1962).

[4] *Worthen Co.* v. *Kavanaugh*, 295 U.S. 56, 60 (1935); *United States* v. *Yazell*, 382 U.S. 341, 347-50 (1966); *Farmer's & Merchant's Bank of Monroe* v. *Federal Reserve Bank of Richmond*, 262 U.S. 649, 660 (1923); *American National Bank & Trust Co. of Chicago* v. *General Outdoor Advertising Co.*, 18 Ill. App.2d 602, 153 N.E.2d 110, 113 (1st Dist. 1958).

Rector v. *Warner Bros. Pictures, Inc.*, 102 F.Supp. 263, 264 (S.D. Cal. 1952). Indeed no antitrust case had even suggested any other result.[5]

The lawyers who were involved in the 1957 settlement and releases were not "unwary" attorneys but experienced antitrust lawyers[6] representing sophisticated litigants who would be presumed to have known that under the antitrust law as it then existed, to reserve rights against joint tort-feasors, the settlement had to be framed in terms of a covenant not to sue or a release with an express reservation of rights against unnamed co-conspirators (and indeed it was well-known practice to do so[7]). That they chose not to provide for such a covenant or reservation, shows that they *in fact* intended that the settlement *would* release unnamed co-conspirators.[8] To hold otherwise is to hold

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[5] The district court decision in the *Winchester Drive-In Theatre* case, the only antitrust case cited by the Court's instant opinion as representing a different rule (Op. 23-24), was not decided until 1964 and was promptly overruled by the Court of Appeals on the strength inter alia of this Court's 1964 decision in *Aro*, which the Ninth Circuit read as adopting the rule that the release of one releases all absent an express reservation to the contrary (351 F.2d at 931). In fact, although the instant opinion states that there was no reservation of rights in *Aro* (Op. 24), there was a reservation of rights against contributory infringers (see 377 U.S. at 494, 496).

[6] Mr. Thomas C. McConnell for Zenith; Mr. John T. Cahill of Cahill, Gordon, Reindel & Ohl for RCA; Mr. Whitney North Seymour of Simpson, Thatcher & Bartlett for General Electric; Mr. John T. Wood of Dewey, Ballentine, Bushby, Palmer & Wood for Western Electric (A. 2786).

[7] See, *e.g.*, *Lysfjord* v. *Flintkote Co.*, 135 F.Supp. 672, 675 (S.D. Cal. 1955); *Rector* v. *Warner Bros. Pictures, Inc.*, 102 F.Supp. 263, 265 (S.D. Cal. 1952).

[8] See *United States* v. *Yazell*, 382 U.S. 341, 347-50 (1966); *In re Shubert's Will*, 10 N.Y.2d 461, 180 N.E.2d 410, 416 (1962); *American Security & Trust Co.* v. *Frost*, 117 F.2d 283, 285 (D.C. Cir. 1940), *cert. denied*, 312 U.S. 707 (1941); *American National Bank & Trust Co. of Chicago* v. *General Outdoor Advertising Co.*, 18 Ill. App.2d 602, 153 N.E.2d 110, 113 (1st Dist. 1958).

that parties, while intending a certain result, used language which they knew under the law as it then existed would not produce that result. We respectfully submit that this would be contrary to all logic.

That it *was in fact* the intent of the parties that joint tort-feasors should have the benefit of the release is confirmed by the judicial admission of Zenith through its counsel Mr. T. C. McConnell. In opposing the motion to reopen he admitted upon a question of the District Court that if HRI was a "joint tort-feasor, as we allege they were, they would be released . . ." (AA. 189; A. 3035). Mr. McConnell was the lawyer who negotiated the settlement for Zenith (A. 2783-86). He obviously intended that the releases have the effect of releasing unnamed joint tort-feasors. Otherwise why would he have permitted his client to execute releases which he understood had the legal effect of releasing joint tort-feasors.

Confirming evidence of Zenith's intent is the fact that at no time after the reopening hearing in March 1965, until Zenith's reply brief in this Court, over five years later, did Zenith question that the releases applied to joint tort-feasors.[9]

As to the intent of the parties receiving the releases, almost contemporaneous with their execution General Electric was obtaining summary judgment in an antitrust case

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[9] Zenith's failure to make any such assertion plus Mr. McConnell's statement in the trial court led the government in its amicus brief on the first certiorari in this case to conclude that "Zenith seemed to concede (VII A. 3035) that this particular release extended to liabilities resulting from the pre-1957 acts of all parties to the conspiracy charged in that earlier litigation" (Brief for United States as Amicus Curiae, No. 49, October Term 1968, pp. 42-43).

The only argument Zenith ever made before its reply brief was that releases of future damages from past acts were unenforceable as "against public policy" (A. 3035).

on the basis *inter alia* that a release to Corning Glass Works released General Electric as an alleged co-conspirator. *Solar Electric Corp.* v. *General Electric Co.*, 156 F.Supp. 51, 58 (W.D. Pa. 1957). The same position was taken by Simpson, Thatcher & Bartlett, who represented RCA in the 1957 settlement, in *Eagle Lion Classics* v. *Loew's*, 121 F. Supp. 128, 129 (S.D.N.Y. 1954) and *Michael Rose Productions* v. *Loew's, Inc.*, 141 F.Supp. 257, 263 (S.D.N.Y. 1956).[10] In fact, compare the standard "Julius Blumberg, Inc." printed form involved in the *Michael Rose* case (141 F. Supp. at 259-60) with the release herein (Op. 20 n. 10).

For RCA, General Electric and Western Electric to have accepted a release which did not benefit joint tort-feasors would have been foolhardy, for it could have exposed those companies to a possible claim of contribution among joint tort-feasors, thereby creating the possibility that they might have to contribute to a treble damage recovery by Zenith against another alleged joint tort-feasor.[11]

If the Court cannot accept the established presumption that parties have acted with knowledge of the law, and Zenith's admissions, as dispositive, we submit that the question of intent should be remanded so that there may be a hearing and a *factual* determination of the "intention of

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[10] In both these cases the release was ultimately held to be not dispositive of the case, because of a question as to whether the releases were intended to include antitrust claims. See 143 F.Supp. 606, 607 (S.D. N.Y. 1956) and 219 F.2d 196, 198 (2d Cir. 1955). However, neither of these subsequent rulings in any way disturbed the ruling that absent an express reservation a release given to one joint tort-feasor releases all.

[11] The question of contribution or indemnity among joint tort-feasors was far from settled, particularly in an active-passive situation. See, *e.g.*, "Contribution In Antitrust Actions," 31 Fordham L. Rev. 110 (1962-63); 45 N.Y. U. Law Rev. 263 (1970).

the parties to the 1957 release" (Op. 25). That factual determination should not be limited to a consideration of the settlement agreement (upon which this Court placed sole reliance) but should consider all relevant evidence. It is settled that if parol evidence is to be used to explain a document all such evidence must be considered, *Asheville Mica Co.* v. *Commodity Credit Corp.*, 335 F.2d 768, 771 (2d Cir. 1964), and that appellate courts should not draw factual conclusions by speculation where the data necessary for certainty was not given the trial court. *Riley* v. *Titus*, 190 F.2d 653, 655 (D.C. Cir. 1951), *cert. denied*, 342 U.S. 855 (1951).

III.

The Court pointed out that to the extent the 1957 settlement compensated Zenith for 1959-1963 damages from prerelease conduct of the pool:

> ". . . HRI would have available to it a defense of payment, for it is being ordered by the District Court to make full payment for all the 1959-1963 damages inflicted by all the members of the pool. It is settled that, entirely apart from any release, a plaintiff who has recovered any item of damage from one coconspirator may not again recover the same item from another conspirator; *the law*, that is, *does not permit a plaintiff to recover double payment.*" (Op. 26).[12]

However, the Court indicated that the defense of payment does not apply because the record shows that the $10 million cash payment was for past damages.

The Court's decision is based on the erroneous assumption that the only consideration given Zenith for the 1957 settlement was $10 million (Op. 26), when in fact the value

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[12] Where emphasis appears in quotations in this petition, it has been supplied by us unless otherwise indicated.

of the consideration received by Zenith amounted to $45,000,000.

The agreement for settlement of the Delaware and Chicago actions (Plaintiff's Exhibit No. 48, A. 2783-86) called for the payment of $10 million in cash, but also involved releases of claims for past infringements by Zenith, and continuing royalty-free, world-wide patent licenses. Mr. McConnell, Zenith's counsel who signed the 1957 settlement agreement (A. 2786), in opposing HRI's motion to reopen in this case, stated as to the 1957 settlement:

> "And they paid my client ten million in cash, twenty-two million dollars in forgiven claims for royalties, free licenses all over the world, a *total* result accounting to some *forty-five million dollars* . . ." (AA. 171).

Thus, the consideration to Zenith involved $10,000,000 in cash for past damages for Canada, forgiveness for claims for past infringements valued at $22,000,000, and royalty-free world-wide licenses valued at $13,000,000, totalling $45,000,000.

That a substantial part of the settlement above and beyond $10 million was for future damages is clearly shown by the testimony of Zenith's President Wright on examination by Zenith's counsel. He confirmed that the $10 million in cash was the "simple computation of single damage in Canada during the damage period" in the *RCA* case and that the $10 million figure was the one used to settle the lawsuit "for our loss and damage" (A. 656-57). The remainder could not be for the other countries because Wright testified that "Mr. McConnell and I agreed that we would waive the damages that we had asked for loss of trade in other foreign countries" (A. 652), that Zenith felt it could not prove damages as to England and Australia, and that the parties got to the point in the settlement nego-

tiations where they were talking only about damages in Canada (A. 656-57).[13]

The releases included not only past damages but all claims, causes of action, etc., which Zenith "hereafter can, shall or may have" by reason of acts occurring prior to the releases (A. 3051-52). Since the $10 million cash payment was for past damages as to Canada and no damages were claimed as to other countries, it is unavoidable that a substantial portion of the remaining consideration valued at $35 million was for future damages which Zenith might suffer in Canada as the result of the pre-release conduct of the pool, including damages suffered during the 1959-1963 period. We respectfully submit it was error for this Court to conclude that the defense of payment "is not sustainable on the facts contained in the record" (Op. 26).

The Court also commented on the question of timeliness and failure to "press" the $10 million as payment in this Court (Op. 26). Obviously a payment for pre-release damages would not apply against a claim for future damages. As concerns the additional $35 million consideration, HRI was not apprised that the settlement had this substantial value in excess of the $10 million until the arguments on the motion to reopen (AA. 171). The issue here presented was the correctness of the Court of Appeals' ruling that the release, irrespective of the extent of consideration, constituted an absolute defense to future damages based on pre-release acts.[14] However, in discussing

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[13] In the Delaware case, which involved a declaratory judgment action by Zenith as to patents and a counterclaim of patent infringement, Zenith made similar broad allegations as to conspiracy, etc., as were made in the Chicago litigation, but as a patent misuse and antitrust defense to the enforcement of patents (PX 36, A. 2667-90). See *Zenith Radio Corp.* v. *RCA*, 121 F.Supp. 802 (D. Del. 1954).

[14] We comment briefly as to "timeliness" of the release defense at pp. 16-17, *infra*.

that issue, HRI specifically pointed out to this Court that the total value of the settlement to Zenith was $45 million, and that the $10 million cash payment discharged past damages (HRI Main Br., No. 1117, Oct. Term 1969, pp. 22-23 and n. 14).

In any event, the Court has pointed out that the law does not permit Zenith "to recover double payment" (Op. 26), so that to the extent that the consideration received was compensation for the damages claimed here, it should be deducted from the amount awarded by the trial court, particularly since, as this Court pointed out in its first opinion, Zenith's evidence as to the fact of damage in Canada was "by no means conclusive" (AA. 14; 395 U. S. at 114).

IV.

We call attention to the record in the recently decided case of *Zenith Radio Corporation* v. *United States*, No. 67 C 1675, Northern District of Illinois (see affidavit of Victor P. Kayser, attached hereto), because it offers an insight into the relatively small amount of damage suffered by Zenith in Canada by reason of post-release conduct. It thus emphasizes the grave impact of this Court's failure to give effect to the 1957 releases and from the preclusion of any further hearing on the amount of Zenith's damages.

In *Zenith* v. *U.S.*, which first came to the attention of HRI's counsel after the November 10, 1970 argument in this Court, Zenith sought to obtain capital gains treatment on the $10,000,000 in cash it had received for past damages as to Canada in the *RCA* case, asserting that the payment was for damage to good will and not for lost profits. After extensive discovery the case was submitted to the Court which ruled against Zenith on December 8, 1970.

The lack of major damage to Zenith by reason of the post-release conduct of the pool was disclosed in the testimony

in that case of Mr. Wright, now Chairman of Zenith, and of Mr. Sydney Capell, who was involved in setting up Zenith's Canadian business after the *RCA* case settlement and is currently Vice President and General Manager of Zenith's Canadian radio and television subsidiary.

Mr. Wright's testimony showed that despite the Trade Builder ad in 1958 and the question raised by the pool as to the need of Zenith to have a license, Zenith was able quickly to obtain a distribution organization and build up a substantial market after the 1957 settlement:

"Q. Going back to 1959 when you began to build a marketing organization in Canada, I assume you have probably had a few problems in overcoming or doing an about-face on the previous situation with Canadian Patents Limited. How did you go about convincing distributors that it was now okay to distribute Zenith products?

A. Well, of course, the settlement of that lawsuit got great publicity here in the United States.

Q. Yes.

A. And also in Canada; and the Government lawsuits against Westinghouse and GE—

Q. Yes.

A. (Continued)—drew very critical comments from Canadian sources that the United States was trying to interfere with internal affairs in Canada and I think everyone had been following it and knew all about it *so it was not a question of our having to build a district organization. It was a question of our picking and choosing from the people waiting at the door.*

Q. The appetite was still there.

A. *The appetite was still there and from a very nominal start, it built up into a very substantial business in a very short period of time*" (Wright Dep. pp. 55-56).

As concerns the question whether distributors were frightened off by the continued existence of the Canadian pool or its policies, Mr. Capell testified, in part, in connection with obtaining distributors:

> "Q. Did any of them express any fear of additional lawsuits by CRPL that you can recall?
>
> A. These particular people who had expressed interest in handling the product, any that I recall talking to (and I don't recall it too clearly) weren't apparently concerned with that" (Capell Dep. pp. 57-58).

As to the question of concern by distributors by reason of notices or advertisements by the pool, Mr. Capell testified:

> "Q. How about after you went to work for Zenith and you began contacting Mr. Miguel's list of contacts; did any of these people raise with you discussion of these kinds of notices or advertisements (again referring to defendant's Exhibits A through E for identification)?
>
> A. No. No." (Capell Dep. p. 74).

Although Zenith has contended in this suit that it had so little success in getting distributors that it was "forced to use its Canadian hearing aid distributor as a television distributor" (Zenith Reply Brief, No. 49, Oct. Term, 1968, p. 27), Mr. Capell testified as follows:

> "Q. Did anybody ever look into the possibility of expanding the organization that he [the hearing aid subsidiary] had? For example, did you ever consider that?
>
> A. No, because it was considered that these people were specialists in the hearing-aid field, and we would need people who were experienced in the radio-TV merchandising field. A different kind of dealer outlet

we would be looking for, you see" (Capell Dep. pp. 51-53).

The testimony in *Zenith* v. *U. S.* concerning the success of Zenith's business after the 1957 settlement shows that the impact of the post-release conduct of the pool was substantially less than asserted by Zenith in the instant litigation (A. 456-458, 472-490).[15]

V.

We are fully cognizant that petitions for rehearing are granted most rarely, and that this Court has spoken on those questions of antitrust law which presumably caused it to grant certiorari. We are also aware that this Court has characterized this as "marathon litigation" (Op. 1), and indicated its desire to now bring it to an end (Op. 18-19). However, we suggest that a further hearing should be granted and the decision modified, not only because of the potentially broad and unsettling impact of the new presumption of intent created by the Court as to releases, but also as a matter of basic justice to HRI.

(a) As to the length of the litigation, Zenith did not file its counterclaim until May 22, 1963, some 3½ years after the complaint was filed (November 1959). During the period from January, 1965, when the original trial findings were entered calling for a judgment of almost $49,000,000, until this Court's first opinion on May 19, 1969, over four years later, HRI was engaged in establishing that *about $30,000,000* of the initial Zenith claim was unjustified. If HRI *had been denied* the time and opportunity to prove

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[15] The tax case testimony confirms the statements in Zenith's Annual Reports to its Shareholders (1959: "strong distribution network at both wholesale and retail levels"; 1960: "important gain"; 1961: "enthusiasm of distributors and dealers", "gratifying progress"; HRI Main Br., No. 49, October 1968 term, pp. 113-115).

the embargoes and related matters, *Zenith would have been awarded $30,000,000 to which it had no legal right.* Should Zenith now be awarded $19,000,000 to which, at least in part, it has no legal right?

(b) The Court criticizes HRI's trial counsel for failure to raise the defense of release and limitations after Zenith's pre-trial brief and contentions during trial indicated that Zenith would claim damages based on pre-release and pre-damage period conduct (Op. 5, and n.1). However this criticism overlooks the fact that a purpose of pleadings is to enable the adverse party adequate opportunity to answer and prepare for trial[16] through discovery and that Zenith did not disclose its new position during discovery and instead waited until the eve of trial.

Certainly, when Zenith stated in its motion for leave to file its counterclaim and its sworn affidavit that it was seeking damages only on the basis of acts occurring after the filing of the answer on April 7, 1960 (Op. 5, n. 1), HRI's counsel was *entitled to rely* on those representations in evaluating the counterclaim filed May 22, 1963.[17] Accordingly, although he knew there had been a settlement agreement calling for general releases (PX 48, A. 2783), there would be no reason why he would investigate as to whether the releases subsequently given covered future damages from pre-1957 acts. Indeed, the pleading of the release (and limitations) would have been irrelevant.

The Court states that Zenith gave notice of its new position in its pre-trial brief (Op. 5, n.1; Concurring Op. 2,

[16] 2A Moore, Federal Practice, ¶ 8.13, p. 1695.

[17] There were references to earlier conduct but these were to outline the nature of the alleged conspiracy and form a basis for injunctive relief.

n.1); however that brief was served on Tuesday, February 11, 1964[18] and the trial began Monday, February 17, 1964—just six days later. In light of Zenith's motion and affidavit that its damage claim was based on acts occurring after April 7, 1960, it cannot be said that prior to February 11, 1964, HRI was "unambiguously called upon to submit a formal plea" of release or limitations (Op. 12-13). And if HRI's counsel is to be faulted for failing to conduct a factual investigation, discover the scope of the release, and amend his pleading, all in the few days before trial, does not this transform this litigation into a "game of skill in which one misstep by counsel may be decisive to the outcome"? (Op. 13).

It was not until additional counsel entered the case and had an opportunity to make an investigation in light of the record and the findings, that it was determined that the releases which had been executed did in fact include *future* damages from pre-release acts. We submit that whether or not original counsel might have determined that fact *after* trial is not relevant, because discovery of the scope of the release called for reopening of the proof after the initial trial in any event.

(c) If this Court's reluctance to see any further proceedings take place in this case (Op. 18-19) compels it not to grant a further hearing on any of the matters raised herein, then we respectfully urge that the Court consider exercising its power of remittitur to reduce the award below in

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[18] The proof of service, which is part of the record before the Court but not printed in the Appendix, is reproduced as an attachment to the affidavit of Victor P. Kayser, filed herewith. See also AA. 234 where, during the reopening argument, it was pointed out to the trial judge that the pre-trial brief was filed only six days before trial.

light of the release defense or at least to reflect the compensation received by Zenith in the RCA settlement. 6A Moore, Federal Practice ¶ 59.05 [3], pp. 3737-52, at 3738 (2d ed) ("The use of remittitur . . . furthers the legitimate objective of bringing litigation to as speedy and expeditous end as is reasonable").

Applying the release, damages from post-release conduct might be approximated by comparing Zenith's post-release market share with its initial U.S. television market share (A. 3563-65). Applying only the settlement compensation, its effect could be approximated by allocating the consideration in declining amounts over the years, reflecting decreasing injury from pre-release conduct (Op. 19-20 and n. 9).

We respectfully submit that this Petition for Rehearing should be granted.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

I certify that this petition is presented in good faith and not for delay.

Victor P. Kayser

Dated: March 19, 1971

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970.

No. 80

ZENITH RADIO CORPORATION, A CORPORATION,
Petitioner,

vs.

HAZELTINE RESEARCH, INC., A CORPORATION,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

COUNTY OF COOK }
STATE OF ILLINOIS } ss

AFFIDAVIT OF VICTOR P. KAYSER

Victor P. Kayser, being first sworn on oath deposes and says:

(1) He is an attorney for Hazeltine Research, Inc. (HRI), respondent in the above entitled case, and was actively involved in the proceedings in the trial court after entry of the initial findings and in the various appellate proceedings in this case.

(2) The case of *Zenith* v. *United States,* No. 67 C 1675, Northern District of Illinois, first came to the attention of HRI's counsel in December 1970 as a result of a news story

concerning the decision in that case by the District Court on December 8, 1970. The quotations in the foregoing Petition for Rehearing from depositions in *Zenith* v. *United States* are true and correct quotations taken from certified copies of the indicated depositions on file with the Clerk of the aforesaid United States District Court for the Northern District of Illinois.

(3) Attached hereto is a true and correct copy of the proof of service of Zenith's pretrial brief showing service of this brief upon HRI's counsel on Tuesday, February 11, 1964.

/s/ VICTOR P. KAYSER

.....

Victor P. Kayser

SUBSCRIBED and SWORN to before
me this 17th day of March, 1971.

/s/ RUTH REINSTEIN

.....

Notary Public

My commission expires
11 day of January, 1975.

IN THE

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

HAZELTINE RESEARCH, INC., Plaintiff, v. ZENITH RADIO CORPORATION, Defendant.	Civil Action No. 59 C 1847

Service and receipt of four (4) copies of ZENITH'S PRE-TRIAL BRIEF OF THE ANTI-TRUST ISSUES RAISED IN THE ANSWER AND COUNTERCLAIM is acknowledged this 11th day of February, 1964.

/s/ RICHARD D. MASON
Attorney for Hazeltine Research, Inc.

NOTE: Where it is deemed desirable, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Lumber Co.*, 200 U.S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

ZENITH RADIO CORP. *v.* HAZELTINE RESEARCH, INC.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 80. Argued November 10, 1970—Decided February 24, 1971

Respondent (HRI) brought a patent infringement suit against petitioner (Zenith) in 1959, and in 1963 Zenith counterclaimed for damages alleging violations of the Sherman and Clayton Acts by HRI's participation in patent pools in Canada, Great Britain, and Australia, restricting Zenith's operations in those countries. A year after evidence was closed, the trial judge entered preliminary findings of fact and conclusions of law favoring Zenith. HRI then moved to amend its reply to the counterclaim and to reopen the record for taking additional evidence. HRI sought to assert defenses of the statute of limitations, and release, claiming that part of the damages awarded Zenith for 1959–1963 were caused by pre-1959 conduct and thus barred by the statute of limitations, or were barred by a 1957 release given by Zenith to certain American companies in settlement of a civil treble-damage action. The trial judge permitted the defenses to be filed but refused to reopen the record or modify his findings and conclusions concerning the Canadian market. The Court of Appeals reversed on the ground that Zenith had failed to prove injury to its business. This Court reversed with respect to Canada, holding that there was ample evidence of damage in the Canadian market, 395 U. S. 100, and noting that the trial judge had either rejected the limitations and release defenses on the merits or deemed them waived. On remand the Court of Appeals held that the trial judge erroneously rejected the defenses on their merits. That court, while doubting that Zenith's claim that the statute of limitations was tolled (by reason of a Government antitrust suit pending from 1958 to 1963 against various companies participating along with HRI in the Canadian patent pool), was properly before it, since no formal plea had been entered, rejected the tolling argument, concluding

Syllabus

that tolling takes place only with respect to parties to a Government suit and HRI was not such a party. The court further ordered evidence to determine the extent of reduction of damages by virtue of the defenses it sustained. *Held:*

1. Under the circumstances of this case, the trial judge did not abuse his discretion if his rejection of the limitations and release defenses was based on HRI's waiver due to untimeliness of their presentation. Pp. 7–11.

2. The Court of Appeals erroneously rejected Zenith's claim that the statute of limitations was tolled during the pendency of the Government's antitrust suit against the other participants in the patent pool. Pp. 11–16.

(a) Where, as here, a plaintiff has no reason to anticipate that a claim of limitations will be raised against him, he need not set forth his claim of tolling until the limitations claim is raised. P. 12.

(b) Under 28 U. S. C. § 16 (b) the statute of limitations is tolled against all participants in a conspiracy that is the object of a Government suit, whether or not they are named as defendants or conspirators therein. Pp. 13–16.

3. A plaintiff in an antitrust action may recover damages occurring within the statutory limitation period that are the result of conduct occurring prior to that period if, at the time of the conduct, those damages were speculative, uncertain, or otherwise incapable of proof. Pp. 17–20.

4. The effect of a release upon coconspirators is to be determined in accordance with the intention of the parties, and here HRI, which was neither a party to the 1957 release nor a parent or subsidiary of a party, is not entitled to the benefit of the release, as the agreement to exchange releases provided expressly that they were "to bind or benefit" the party and "the parent or subsidiaries of the party giving or receiving such release." Pp. 20–26.

418 F. 2d 21, reversed and remanded.

WHITE, J., delivered the opinion of the Court, in which BURGER, C. J., and BLACK, DOUGLAS, BRENNAN, MARSHALL, and BLACKMUN, JJ., joined. HARLAN, J., filed an opinion concurring in the result, in which STEWART, J., joined.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 80.—October Term, 1970

Zenith Radio Corporation, Petitioner, *v.* Hazeltine Research, Inc.	On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

[February 24, 1971]

Mr. Justice White delivered the opinion of the Court.

This is the second time this marathon litigation has been before us. It began in 1959 as a suit for patent infringement brought by Hazeltine Research, Inc. (hereafter HRI), against Zenith. In 1963, Zenith filed a counterclaim against HRI alleging violations of the Sherman and Clayton Acts, 15 U. S. C. §§ 1, 2, 15, 26, by reason of HRI's participation in patent pools in Canada, Great Britain, and Australia. These pools, it was claimed, operated to exclude Zenith from those foreign markets by refusing to grant patent licenses to American manufacturers seeking to export American made radio and television sets. Trial was had without a jury. Zenith submitted telling evidence as to the existence and operation of the conspiracy and HRI's participation in each of the markets. Zenith demonstrated the fact and extent of its business injury by estimating the percentage of the foreign market it would have enjoyed absent the conspiracy during the four years prior to 1963 and showing the portion it actually enjoyed during those years. The difference between the profits it actually made and the profits it would have made in a free market during the four years was the measure of the damages demanded.

A year after evidence was closed, the trial judge entered preliminary findings of fact and conclusions of law favoring Zenith. He concluded that Zenith had been damaged $6,297,371 in the Canadian market, $9,248,926 in the English, and $692,555 in the Australian, a total of $16,238,872 before trebling. HRI then moved to amend its reply to Zenith's counterclaim and to reopen the record for the taking of additional evidence. The motion sought leave to assert the defenses of limitations and release; the claim was that part or all of the damages awarded to Zenith for the four years 1959–1963 were caused by pre-1959 conduct and to that extent were barred by the statute of limitations, 15 U. S. C. § 15b, or by a release given by Zenith to certain American companies in 1957. HRI also sought leave to prove that until specified dates Zenith's exclusion from the English and Australian markets had been due not to the operation of the alleged patent pools, but to such matters as official embargoes, tariffs, and technical factors. The trial judge agreed to take additional evidence with respect to England and Australia but refused to reopen the record for other purposes or to modify his findings and conclusions concerning the Canadian market. He did, however, permit the limitations and release defenses to be filed and, after hearing evidence with respect to the English and Australian markets, reduced his award of damages with respect to them. 239 F. Supp. 51 (1965).

In the Court of Appeals, HRI asserted error on various grounds. Putting aside other issues, the Court of Appeals reversed on the ground that Zenith had failed to prove injury to its business in any of the three markets. 388 F. 2d 25 (1967). We in turn affirmed the judgment denying recovery for the alleged injury in the English and Australian markets, but reversed with respect to Canada, holding that Zenith's evidence amply demonstrated the fact of damage in the Canadian market.

395 U. S. 100 (1969). We also noted that some portion of the damages proved and awarded resulted from conspiratorial conduct prior to 1959 and that the trial judge had either rejected on the merits the defenses of limitations and release or deemed them waived. *Id.*, at 117 n. 13. We went no further, however, with respect to the issues surrounding either defense.

The Court of Appeals on remand accepted as duly proved that absent the conspiracy Zenith would have enjoyed a 16% share of the Canadian market and that the difference between 16% and the share it actually had was the measure of the total damages inflicted by the conspiracy during the four years 1959–1963. But recognizing that some portion of Zenith's business injury resulted from conspiratorial conduct prior to 1959, the court went on to hold that the trial judge had not rejected the defenses of limitations and release on waiver grounds but had erroneously rejected them on their merits, and further that Zenith's claim that the statute had been tolled had been waived by Zenith and was in any event unsound. Finally, the court ordered further evidence to be taken in the trial court to determine the extent to which, if any, the damages awarded by the trial court should be reduced by virtue of the defenses sustained in the Court of Appeals. 418 F. 2d 21 (1969).

We granted certiorari. 397 U. S. 979 (1970). Zenith's principal contentions here are that the trial judge properly deemed the limitations and release defenses to have been waived, that if not waived, the defenses were without merit, and that in any event the statute of limitations was tolled by the pendency of a government suit against HRI's coconspirators. We need not decide whether the trial judge held the defenses waived or rejected them on the merits, since in our view, either course would have been legally sound. We therefore reverse the Court of Appeals.

I

We deal first with Zenith's claim that the defenses of limitations and release were properly held by the trial court to have been waived. To do so it is essential briefly to outline the course of the trial and evidence. Zenith's 1963 counterclaim alleged the existence of the conspiracy and the impact on its business and prayed for damages and injunctive relief, but made no allegations as to the time period as to which damages were sought. These latter matters became clear during the pretrial proceedings and during the course of the trial itself. In its pretrial brief and opening statement Zenith asserted that the illegal pools had existed for many years; that Zenith had conspiratorially been refused a license to import into Canada; and that litigation had been threatened and potential distributors discouraged. The conspiracy was said to have been not only a longstanding but also a worldwide one, against certain members of which the United States Government had brought an antitrust action and Zenith itself had recovered $10,000,000 in 1957 in settlement of a civil treble damage action. But Zenith disclosed that, although the conspiracy had been worldwide and long existing, it would seek to recover damages for restraint of its trade in the three foreign markets only during the "four-year statutory damage period."

At trial Zenith introduced voluminous evidence with respect to the operations of the conspiracy and its impact on its business. The testimony with respect to Canada was that in a free market Zenith would have had the same share of the Canadian market as it enjoyed in the United States and that the existence and operation of the conspiracy had restricted its Canadian business. Specifically Zenith claimed that in the four years after June 1, 1959, it had lost profits aggregating some $6,300,000 as the result of conspiratorial conduct by the

Canadian patent pool during and prior to that period. Counsel made Zenith's position perfectly clear in his summation and post-trial brief: except for the Canadian pool, Zenith would have had a 16% share of the Canadian market, but as a result of the pool it had only a 3% share. Zenith thus argued that it was entitled to the full difference between 16% and 3% for the entire four-year period. It also made similar claims with respect to the English and Australian markets.

Although Zenith's counterclaim on its face sought to recover all damages suffered in past years without restriction,[1] HRI pleaded neither limitations nor release in its reply to the counterclaim. Zenith instead revealed its own awareness of the statutory limitation period during the trial and expressly restricted its proof to damages suffered during the statutory four-year damage period. However, Zenith sought to recover all damages suffered during those years even though it was unmistakably clear that some of this damage had been caused by conspiratorial action prior to 1959. Yet, at no time during the trial did HRI suggest that the statute barred Zenith's recovery of any part of its total damage suffered during that period. HRI did challenge Zenith's claim that it would have had a 16% share of the Canadian market on the ground that the evidence was speculative—indeed, that it was so speculative that Zenith had failed entirely to sustain its burden of proving damage, but it interposed no objection

[1] It is true that in its motion for leave to file its counterclaim, Zenith stated that the counterclaim arose out of conduct of HRI "occurring since the filing of the answer" in 1960. On the basis of this statement, HRI argues that Zenith precluded itself from recovering damages resulting from pre-answer conduct. This argument is not persuasive. The counterclaim itself was not so limited, and Zenith made its position on damages absolutely clear by the opening of trial. HRI was thereby given both ample notice of the substance of Zenith's claim and ample opportunity to respond, but made no effort during trial to do so.

to Zenith's demand for all damages sustained during the four-year period, no matter when the operative acts had occurred. Not until one year after trial, when it learned that the judge's findings and conclusions were unfavorable, did HRI assert that part of the post-1959 damage was the result of pre-1959 conduct and was barred either by the statute of limitations or by the release given by Zenith in 1957 in settlement of its suit against other American companies.[2]

Other than a general attack on the sufficiency of Zenith's proof of damages and a demand that the matter be relitigated, HRI's post-trial motion had three principal branches. First, it sought leave to file the defense of limitations. The motion in effect asserted that the conspiracy, even if it had continued during the damage period, had committed no damaging overt acts during that period, all of Zenith's damage being caused by pre-1959 operations of the pool. HRI asserted as a legal matter that the statute of limitations would therefore bar Zenith's entire claim on the record then before the Court. Second, HRI sought to interpose the defense of release. The argument was that some or all of Zenith's post-1959 damages were the consequence of pool activity occurring prior to the date of a 1957 release given to American companies which were coconspirators of HRI in the Canadian pool. That release, it was claimed, also released HRI. Third, HRI sought to reopen the record

[2] Zenith similarly limited its claim for damage in the English and Australian markets to the years 1959–1963 and similarly sought to recover all damage suffered in those years without regard to the date of the conduct causing the damage. HRI again did not plead or argue that Zenith was not entitled to its full damage during those years in the two markets, until it moved after trial to set aside the judge's findings and to reopen the proof so that it could show that Zenith's exclusion from the markets prior to 1959 was a consequence of governmental restrictions and technical difficulties rather than of pool conduct.

to show that until well into the four-year damage period Zenith's inability to enter the English and Australian markets was due to official embargoes, other governmental policies and technical difficulties rather than to the operations of the patent pools.

The motion was thoroughly and extensively argued. With respect to the defenses of limitations and release, the trial court's ruling, after Zenith objected to them as being "too late," was expressed as follows: "Well, the record will show that leave is given to file them at this time, after proofs are closed and after findings have been made."[3] This ruling was immediately followed by the court's refusal either to reopen the record for additional evidence with respect to Canada or to modify its judgment in any way as to that market. The record as to England and Australia, however, was reopened for further proof as to the operative forces other than the patent pools which in fact had prevented importation of Zenith's products into those markets.

Arguably, since the trial judge permitted the limitations and release defenses to be filed but then rejected them by refusing to amend the judgment with respect to Canada, rejection was necessarily on the merits. But the record also yields to the construction that the two defenses were overruled because a just and sensible ruling on their merits would have required a reopening of the record for a virtual retrial of the issue of damages, an eventuality which the trial court deemed unwarranted in view of HRI's delinquency in raising the defenses. If this was the course the trial judge took, we would not disturb his judgment.

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[3] The District Court gave HRI five days to file its amendments to the pleadings "nunc pro tunc as of" the date of the argument on HRI's motion. As a result, the defenses were technically filed prior to the entry of judgment and the taking of appeal, while the District Court still retained jurisdiction over the suit.

At the time of the trial Rule 8 (c) of the Federal Rules of Civil Procedure required that "[i]n pleading to a preceding pleading, a party shall set forth affirmatively . . . release . . . statute of limitations . . . and any other matter constituting avoidance or affimative defense." Rule 12 (h) at that time provided that "[a] party waives all defenses and objections which he does not present" either by motion or in answer or reply. Based on these rules, Zenith claims that the trial court was required to, and did, hold the two defenses waived.

HRI contends that the District Court should have granted it leave to amend its answer under Rule 15 (a), which provides that such "leave shall be freely given when justice so requires." HRI's position is that the evidence in the record at the time it offered its defenses showed that all of the acts causing damage during the 1959–1963 period had occurred prior to 1959; from this it follows that Zenith had failed, according to HRI, to offer any evidence upon which an award of damages could have been sustained. In the alternative, HRI argues that the record showed that it had been released from all liability for damages flowing from pre-1957 acts.[4] In either case, HRI urges that the damage award be set aside.

It is settled that the grant of leave to amend the pleadings pursuant to Rule 15 (a) is within the discretion of the trial court. *Foman* v. *Davis,* 371 U. S. 178, 182

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[4] At the time HRI raised its defenses, the release on which it relied was not part of the record, although the record did contain a contract between the parties to the release in which they agreed to exchange releases, and frequent reference had been made during trial to the settlement of which the exchange of releases was a part. The record also belied HRI's claim that the conspiracy had been dormant during 1959–1963, for it contained a letter written in 1962 from the pool to a distributor of Motorola products in Canada threatening infringement suits if he continued to distribute American-made products of Motorola.

(1962) (dictum). In a matter as substantial and complex as this one, where HRI claimed it had been misled or at the very least asked to be relieved of mistake or oversight, it might have been within the discretion of the trial judge to have permitted HRI to amend its pleadings to include therein the defenses of limitations and release. But, in deciding whether to permit such an amendment, the trial court was required to take into account any prejudice which Zenith would have suffered as a result, see *Kanelos* v. *Kettler*, 406 F. 2d 951, 954–955 n. 15 (CADC 1968); *United States* v. *47 Bottles, More or Less*, 320 F. 2d 564, 573–574 (CA3 1963); *Caddy-Imler Creations* v. *Caddy*, 299 F. 2d 79, 84 (CA9 1962); 3 J. Moore, Federal Practice ¶ 15.08 [4] (2d ed. 1968), and here the prejudice to Zenith would have been substantial. Zenith's theory that all of its damages suffered during the four-year period were legally recoverable had been made quite clear during the trial, and Zenith had proved up its damages in accordance with that theory. Meanwhile HRI had neither pleaded its defenses, objected to Zenith's evidence, nor otherwise hinted that post-1959 damages caused by pre-1959 conduct were for any reason barred until long after the record had been closed. To have then sustained HRI's defenses would have been to deny Zenith the opportunity to prove its recoverable damages—a denial that hardly comports with the letter or the spirit of Rule 15 (a). At the very minimum, if the defense of limitations or release was to be entertained and deemed to bar that part of Zenith's damages resulting from the lingering consequences of past acts, Zenith would have been entitled to perfect its proof as to damage resulting from pool operations during the four-year period, as well as to prove, if it could, what damages it might have suffered in the future from those acts. To have permitted Zenith to perfect its proof would, of course, have required reopening of the record and a virtual retrial of the issue of damages.

The trial judge here might have permitted reopening. Like a motion under Rule 15 (a) to amend the pleadings, a motion to reopen to submit additional proof is addressed to his sound discretion. See, *e. g.*, *Swartz* v. *New York Central R. Co.*, 323 F. 2d 713, 714 (CA7 1963); *Locklin* v. *Switzer Bros.*, 299 F. 2d 160, 169–170 (CA9 1961); *Gas Ridge, Inc.* v. *Suburban Agricultural Properties, Inc.*, 150 F. 2d 363, 366, rehearing denied, 150 F. 2d 1020 (CA5 1945); 6A J. Moore, Federal Practice ¶ 59.04 [13] (2d ed. 1966). But the record is clear that he refused to reopen with respect to damages in the Canadian market or otherwise to modify the Canadian judgment, and that he thereby rejected HRI's proffered defenses. Although we are not privy to his unexpressed thinking and although his refusal can be read as a rejection of the defenses on the merits, it can also be read as a holding that the defenses were, in effect, waived by the untimeliness of their presentation and hence that the pleadings would not be amended, except as a matter of form, and that the trial would not be reopened.

On the assumption that the trial court did hold the defenses of limitations and release to have been waived, we cannot say that the judge abused his discretion or stressed too much the value of avoiding reopening a trial to litigate matters which HRI had had an opportunity, but neglected, to litigate. Nor is it irrelevant in this connection that HRI's central claims during trial were that there was no conspiracy and that Zenith had suffered no damage at all. The defenses that HRI set out in the post-trial motions were in a sense inconsistent with these trial claims, for the defenses conceded, albeit only *arguendo*, that a conspiracy did exist and that Zenith, absent the conspiracy, would have controlled a sizeable share of the Canadian market. HRI's post-trial argument, in effect, was one of confession and avoidance showing that the conspiracy had been so successful in

the pre-1959 period that it could be relatively or entirely quiescent from 1959 to 1963 and nonetheless cause Zenith substantial damages in those years. It is quite possible that HRI knew exactly what it was doing in not presenting this argument during trial and that it realized a need to present it only after it learned that its original arguments had not induced the court to hold in its favor.

Whatever HRI's reasons for not offering its limitations and release defenses during trial, however, the trial court would not have erred in concluding that they were waived.

II

Assuming, however, that the district judge rejected the defenses of limitations and release on the merits, as the Court of Appeals held, we confront the issue of whether it is consistent with the controlling limitations statute, 15 U. S. C. § 15b, to permit Zenith to recover all of the damages it suffered during the years 1959–1963 even though some undetermined portion of those damages was the proximate result of conduct occurring more than four years prior to the filing of the counterclaim. HRI contends, and the Court of Appeals held, that the statute permits the recovery only of those damages caused by overt acts committed during the four-year period. We do not agree.

A

We turn first to Zenith's argument that, even if the statute of limitations were to be held applicable in this case, the statute was nonetheless tolled from November 24, 1958, to November 1, 1963,[5] pursuant to 28

[5] On November 1, 1962, a consent decree was entered against the last defendant named in the government action, which had been commenced on November 24, 1958, thereby terminating that action as to all parties. See *Barnett* v. *Warners Bros. Pictures Dist. Corp.*, 112 F. Supp. 5, 7 (ND Ill. 1953). For purposes of the present suit

U. S. C. § 16 (b) by reason of a government antitrust action brought against various American companies participating along with HRI in the Canadian pool.[6] If Zenith is correct in this respect and the running of the statute of limitations was suspended during the pendency of the government suit, then it was entitled at the very least to sue in 1963 for any damage to its business occurring by reason of conspiratorial conduct at any time after November 24, 1954.

The Court of Appeals rejected the tolling argument. It had some doubt whether tolling was properly before it since Zenith had never entered a formal plea of tolling, and HRI now contends that Zenith's failure to so plead in its original complaint bars it forever from raising such a claim. This contention is without merit. The cases on which HRI relies themselves establish that where, as here, a plaintiff has no reason to anticipate that a claim of limitations will be raised against him, he need not set forth his claim of tolling until the limitations claim is raised. See *National & Transcontinental Trading Corp.* v. *International General Elec. Co.*, 15 F. R. D. 379, 382 (SDNY 1954). Cf. *Moviecolor Ltd.* v. *Eastman Kodak Co.*, 288 F. 2d 80, 88 (CA2 1961). Nor should Zenith be penalized for failing to enter a formal plea of tolling in response to HRI's belated limitations plea, for Zenith can hardly be blamed for reading the remarks of the trial judge as a rejection of the limitations defense on the ground of waiver. Zenith was never unambiguously

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against HRI, which was not a party to the government action, the running of the statute of limitations was thus tolled until November 1, 1963—one year after the entry of the consent decree. See 15 U. S. C. § 16 (b).

[6] The Government Suit was *United States* v. *General Electric Co.*, Civil Action No. 140–157, which was brought in the Southern District of New York. The complaint and the final judgment were introduced in evidence in the present proceedings as Plaintiff's Exhibits Nos. 44–47.

called upon to submit a formal plea; to hold under such circumstances that want of a submission amounts to a waiver would be to treat pleading as "a game of skill in which one misstep by counsel may be decisive to the outcome"—an approach we have consistently rejected. See *Foman* v. *Davis, supra,* at 181–182; *United States* v. *Hougham,* 364 U. S. 310, 317 (1960); *Conley* v. *Gibson,* 355 U. S. 41, 48 (1957). The interests of justice thus clearly require that if HRI's limitations defense is to be considered on its merits, Zenith's claim of tolling must be dealt with as well.

The Court of Appeals did, in fact, consider the tolling issue on the merits, but concluded that tolling takes place only with respect to parties to a government suit and hence that tolling did not occur here because HRI was not such a party. This was error. The language of 15 U. S. C. § 16 (b) expressly provides for tolling of the statute of limitations "in respect of *every* private right of action . . . based *in whole or in part* on any matter complained of" in the proceeding instituted by the government. (Emphasis added.) On the face of this section, a private party who brings suit for a conspiracy against which the government has already brought suit is undeniably basing its claim in whole or in part upon the matter complained of in the government suit, even if the defendant named in the private suit was named neither as a defendant nor as a coconspirator by the government. If, that is, the government sues only certain conspirators, but also alleges and proves during trial that others were conspirators, the fact of the tolling of the statute against those so proved but not sued can hardly be denied. Nor could tolling be denied if a defendant had never been shown to be a conspirator by the evidence offered in the earlier government suit, but then had been proved to be such in the subsequent private suit.

We find no indication in the legislative history of § 16 (b) that Congress intended it to toll the statute of limitations only against parties defendant in the government action. Nor is anything cited to us in this respect.[7] On the contrary, as we have said earlier, Congress, believing that "private antitrust litigation is one of the surest weapons for effective enforcement of the antitrust laws," enacted § 16 (b) in order to "assist private litigants in utilizing any benefits they might cull from government antitrust actions." *Minnesota Mining & Mfg. Co.* v. *New Jersey Wood Finishing Co.*, 381 U. S. 311, 317–318 (1965). We see nothing destructive of Congress' purpose in holding that § 16 (b) tolls the statute of limitations against all participants in a conspiracy which is the object of a government suit, whether or not they are named as defendants or conspirators therein; indeed, to so hold materially furthers congressional policy by permitting private litigants to await the outcome of government suits and use the benefits accruing therefrom.

It is true that the lower federal courts have until recently confined the operation of the section and held it applicable only to defendants named in the government suit. See, *e. g.*, *Sun Theatre Corp.* v. *RKO Radio*

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[7] HRI does suggest that the 1955 amendment of § 16, see 69 Stat. 283, must be understood as an indication of Congress' approval of earlier cases in the lower federal courts confining the operation of § 16 (b) to parties defendant in government suits. See text *infra*, at —. We are unpersuaded. HRI can point to no direct evidence that Congress ever considered the issue now before us or voiced any views upon it; on the contrary, it appears that Congress left the matter for authoritative resolution in the courts. The true thrust of HRI's argument is that we must find congressional approval of the earlier cases in Congress' silence when it reenacted the statute. We did not take such an approach, however, in *Minnesota Mining & Mfg. Co.* v. *New Jersey Wood Finishing Co.*, 381 U. S. 311 (1965), and *Leh* v. *General Petroleum Corp.*, 382 U. S. 54 (1965), and we do not do so here.

Pictures, Inc., 213 F. 2d 284, 290–292 (CA7 1954); *Momand* v. *Universal Film Exchanges, Inc.*, 172 F. 2d 37, 48 (CA1 1948). But these cases and others like them, as we have indicated, fly in the face of the language of the statute, are antithetical to its aims, and cannot be squared with our recent decisions in *Minnesota Mining & Mfg. Co.* v. *New Jersey Wood Finishing Co., supra,* and *Leh* v. *General Petroleum Corp.*, 382 U. S. 54 (1965). *Minnesota Mining* held that § 16 (b)'s tolling provision was not confined only to those situations in which a government decree, by virtue of § 16 (a), would be prima facie evidence against defendants in a private suit who had also been named as defendants in a government suit. It rejected the view that §§ 16 (a) and 16 (b) are wholly interdependent and coextensive; on the contrary, § 16 (b) was given its full sweep. *Leh,* following *Minnesota Mining,* held that a private litigant was entitled to the benefit of tolling although the conspiracy he alleged covered a different time, named additional parties, and excluded some parties named in the prior government suit. While *Leh* did not explicitly decide whether the statute would be tolled when the sole defendant in a private action covering the same ground as an earlier government suit had been named neither as a conspirator nor as a party in the government suit, we do not believe that such a case could be distinguished from *Leh.* Cases in the lower federal courts since *Leh* have also come to this conclusion. See *New Jersey* v. *Morton Salt Co.*, 387 F. 2d 94 (CA3 1967); *Vermont* v. *Cayuga Rock Salt Co.*, 276 F. Supp. 970 (Me. 1967); *Michigan* v. *Morton Salt Co.*, 259 F. Supp. 35, 53–56 (Minn. 1966), aff'd, 377 F. 2d 768 (CA8 1967).

We therefore hold that Zenith, although suing HRI, which was named neither as a party nor as a coconspirator in the government suit, is not barred from obtaining the benefits of the tolling statute, since it is undisputed

that the conspiracy in which HRI participated was at least in part the same conspiracy as was the object of the government's suit. From this it follows that the only issue still remaining upon HRI's limitations claim is whether Zenith can recover in its 1963 suit for damages suffered after June 1, 1959, as the consequence of pre-1954 conspiratorial conduct.

B

The basic rule is that damages are recoverable under the federal antitrust acts only if suit therefor is "commenced within four years after the cause of action accrued," 15 U. S. C. § 15b, plus any additional number of years during which the statute of limitations was tolled. Generally, a cause of action accrues and the statute begins to run when a defendant commits an act which injures a plaintiff's business. See, *e. g.*, *Suckow Borax Mines Consolidated, Inc.* v. *Borax Consolidated, Ltd.*, 185 F. 2d 196, 208 (CA9 1950); *Bluefields S. S. Co.* v. *United Fruit Co.*, 243 F. 1, 20 (CA3 1917), appeal dismissed, 248 U. S. 595 (1919); *2361 State Corp.* v. *Sealy, Inc.*, 263 F. Supp. 845, 850 (ND Ill. 1967). This much is plain from the treble damage statute itself. 15 U. S. C. § 15. In the context of a continuing conspiracy to violate the antitrust laws, such as the conspiracy in the instant case, this has usually been understood to mean that each time a plaintiff is injured by an act of the defendants a cause of action accrues to him to recover the damages caused by that act and that, as to those damages, the statute of limitations runs from the commission of the act. See, *e. g.*, *Crummer Co.* v. *DuPont*, 223 F. 2d 238, 247–248 (CA5 1955); *Delta Theaters, Inc.* v. *Paramount Pictures, Inc.*, 158 F. Supp. 644, 648 (ED La. 1958); *Momand* v. *Universal Film Exchange, Inc.*, 43 F. Supp. 996, 1006 (Mass.

1942), aff'd, 172 F. 2d 37, 49 (CA1 1948). However, each separate cause of action that so accrues entitles a plaintiff to recover not only those damages which he has suffered at the date of accrual, but also those which he will suffer in the future from the particular invasion, including what he has suffered during and will predictably suffer after trial. See, *e. g.*, *Farbenfabriken Bayer, A. G.* v. *Sterling Drug, Inc.*, 153 F. Supp. 589, 593 (NJ 1957); *Momand* v. *Universal Film Exchange, Inc., supra*, at 1006. Cf. *Lawlor* v. *Loewe*, 235 U. S. 522, 536 (1915). Thus, if a plaintiff feels the adverse impact of an antitrust conspiracy on a particular date, a cause of action immediately accrues to him to recover all damages incurred by that date and all provable damages that will flow in the future from the acts of the conspirators on that date. To recover those damages, he must sue within the requisite number of years from the accrual of the action. On the other hand, it is hornbook law, in antitrust actions as in others, that even if injury and a cause of action have accrued as of a certain date, future damages that might arise from the conduct sued on are unrecoverable if the fact of their accrual is speculative or their amount and nature unprovable. *Moe Light, Inc.* v. *Foreman*, 238 F. 2d 817, 818 (CA6 1956); *Chicago & N. W. R. Co.* v. *DeClow*, 124 F. 142, 143 (CA8 1903); *Culley* v. *Pennsylvania R. Co.*, 244 F. Supp. 710, 715 (Del. 1965). Cf. *Howard* v. *Stillwell & Bierce Mfg. Co.*, 139 U. S. 199, 206 (1891).

In antitrust and treble damage actions, refusal to award future profits as too speculative is equivalent to holding that no cause of action has yet accrued for any but those damages already suffered. In these instances, the cause of action for future damages, if they ever occur, will accrue only on the date they are suffered; thereafter the plaintiff may sue to recover them at any

time within four years from the date they were inflicted. Cf. *Schenley Industries* v. *N. J. Wine & Spirit Wholesalers Association*, 72 F. Supp. 872, 887–888 (NJ 1967); *Delta Theaters, Inc.* v. *Paramount Pictures, Inc., supra*, at 648–649. Otherwise future damages which could not be proved within four years of the conduct from which they flowed would be forever incapable of recovery, contrary to the congressional purpose that private actions serve "as a bulwark of antitrust enforcement" and that the antitrust laws fully "protect the victims of the forbidden practices as well as the public." *Perma Life Mufflers, Inc.* v. *International Parts Corp.*, 392 U. S. 134, 139 (1968); *Radovich* v. *National Football League*, 352 U. S. 445, 454 (1957). See also *Lawlor* v. *National Screen Serv. Corp.*, 349 U. S. 322, 329 (1955).

As we have already seen, acceptance of Zenith's tolling argument requires further consideration only of that portion of Zenith's damages suffered during the 1959–1963 period as a result of pre-1954 conduct of the conspiracy. We must now determine whether Zenith could have recovered those damages if it had brought suit for them in 1954, for if it could not, it would follow for the reasons stated above that it must be permitted to recover them now.

We do not, of course, have the thinking of the district judge on this issue, and ordinarily the matter of future damages would very much depend on his informed discretion.[8] But we are reluctant to return any issue in

[8] If the trial judge had passed upon the question, he well might have concluded that none of the damage sustained by Zenith in the Canadian market between 1959 and 1963 was a consequence of pre-1954 conspiratorial conduct. The trial judge in effect found that, as to England and Australia, the effects of conspiratorial conduct were no longer felt by Zenith more than four years after the conduct had occurred, and there is no reason to infer that his findings would have been different in regard to Canada either in the present suit or in a suit brought in 1954. But the trial judge made no such finding as to Canada, and we lack power to make them for him.

this litigation for another round of proceedings in the trial or appellate courts if we can fairly dispose of it at this juncture. After due consideration, we have determined that in the circumstances of this case, § 15b was no bar to any part of the damages awarded Zenith by the District Court insofar as the Canadian market was concerned.

Let us assume that Zenith in a treble damage suit brought in 1954 had presented evidence similar to that which it presented in the instant suit, indicating that it would have had the same share of a free Canadian market as it did in the United States market. Assume also that it had presented evidence to the effect that, starting in 1954, when it had no sales in the Canadian market, it would have taken 10 years to reach that share in a free market. Given such evidence, the question would be whether a district court would have permitted Zenith to recover estimated profits upon 90% of its share of the hypothetical free Canadian market for its anticipated losses in 1955, 80% for its losses in 1956, and 70% for its 1957 losses, and so on.[9]

We find it difficult to believe that Zenith could have convinced a District Court sitting in 1954 that, although it contemplated a free market from that time forward, it would still be suffering from provable injury more than five years later. It is true that the damages awarded Zenith in this case were based on estimates of its volume of business in a free market. But those estimates were for a past period of time; the size and

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[9] Of course, these percentages are purely hypothetical. They rest upon an assumption that, if Zenith had sued in 1954 for future damages in the Canadian market and had claimed that it would take 10 years for it to attain its full share of that market under free competitive conditions, then it would have proved that in 1955 it would have reached 10% of that share, in 1956, 20%, and so on. In each year it would have recovered damages for that percentage of the share which it had not yet attained.

conditions in the market were known and the competitive forces were identifiable. Zenith's performance during the same period and under comparable conditions was a matter of record. It is quite another matter to predict market conditions and the performance of one competitor in that market five to 10 years hence. The proceedings before us put in stark relief the difficulties of proving the fact and the amount of damage during a period in the immediate past. Claims of future damage would have probably gotten short shrift in the lower courts if they had been pressed in this case. In our view, this is the very treatment such claims would have received had Zenith sued in 1954, and claimed damages for the decade of the sixties. The short of it is that Zenith asserted its cause of action for 1959–1963 damages well within the period during which § 15b entitled it to sue.

III

Entirely apart from its statute of limitations defense, HRI claims that whatever part of the 1959–1963 damages was caused by conspiratorial conduct prior to 1957 is unrecoverable because of a release executed in that year by Zenith in settlement of an antitrust action against other coconspirators in the Canadian patent pool.[10] The

[10] The text of the release was as follows:

"To All To Whom These Presents Shall Come Or May Concern, Greeting: Know ye, That Zenith Radio Corporation and The Rauland Corporation, each a corporation organized and existing under and by virtue of the laws of the State of Illinois, for and in consideration of the sum of One Dollar ($1.00) lawful money of the United States of America and other good and valuable consideration, to them in hand paid by *....., the receipt whereof is hereby acknowledged, have each remised, released and forever discharged, and by these presents does each for itself and its respective subsidiaries, successors and assigns remise, release and forever discharge the said *..... and its subsidiaries and their respective successors and assigns of and from all, and all manner of action and actions, cause and causes of action, suits, debts, dues, sums of money,

release extended not only to past but also to all future damages arising out of pre-1957 conspiratorial acts. However, while it was a coconspirator in the Canadian pool, HRI was neither a party to the 1957 suit nor a party to the release, nor was it named in the release as one of the parties affected thereby. Nonetheless, the Court of Appeals held HRI entitled to the benefits of the release on the ground that Zenith had failed expressly to reserve any rights against HRI, and it therefore remanded the case to the District Court with directions to exclude from the judgment any damages caused by pre-1957 conduct. We again conclude that the Court of Appeals erred.

Three rules have developed to deal with the question whether the release of one joint tortfeasor releases other tortfeasors who are not parties to nor named in the release. The ancient common-law rule, which was grounded upon a formalistic doctrine that a release extinguished the cause of action to which it related, was that a release of one joint tortfeasor released all other parties jointly liable, regardless of the intent of the parties.

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accounts, reckoning, bonds, bills, specialities, covenants, contracts, controversies, agreements, promises, variances, trespasses, damages, judgments, extents, executions, claims and demands whatsoever, in law, in admiralty, or in equity, which against said *....., its subsidiaries and their respective successors and assigns, said Zenith Radio Corporation and The Rauland Corporation and each of them ever had, now has or which each of them and their respective subsidiaries, successors and assigns, hereafter can, shall or may have for, upon or by reason of any matter, cause or thing whatsoever from the beginning of the world to the day of the date of these presents, not including however, claims, if any, for unpaid balances on any goods sold and delivered.

"*Insert

" 'Radio Corporation of America,' or

" 'General Electric Company,' or

" 'Western Electric Company.'

"This release may not be changed orally."

See, *e. g., Western Express Co.* v. *Smeltzer,* 88 F. 2d 94, 95 (CA6 1937); *American Ry. Express Co.* v. *Stone,* 27 F. 2d 8, 10 (CA1 1928); *Barrett* v. *Third Avenue R. Co.,* 45 N. Y. 628, 635 (1871); *Ellis* v. *Esson,* 50 Wis. 138, 146 (1880). While this Court has referred to this rule in cases where the rights of the litigants were controlled by state or federal common law, see *Chicago & Alton R. Co.* v. *Wagner,* 239 U. S. 452, 456–457 (1915); *United States* v. *Price,* 9 How. 83, 92 (1850); *Hunt* v. *Rhodes,* 1 Pet. 1, 16 (1828); we are cited to no case where we have applied the rule to a statutory cause of action created under federal law. Indeed, we have expressly repudiated the rule. See *Aro Mfg. Co.* v. *Convertible Top Co.,* 377 U. S. 476, 501 (1964). Cf. *Birdsell* v. *Shaliol,* 112 U. S. 485, 489 (1884). Moreover, in the lower federal courts, causes of action based upon federal statutes have generally been governed by one of the other two rules. The first of these rules provides that, although a release of one coconspirator normally releases all others, it will not have such an effect if a plaintiff expressly reserves his rights against the others. This rule, which has been adopted with some variation by statute in 21 States,[11] by judicial decision in others, see, *e. g., Mc-*

[11] The Model Joint Obligations Act, 9B U. L. A. 355, which has been adopted in regard to tort claims by four States, is most similar to the rule stated in the text. It provides that a release of an obligor shall release co-obligors to the full extent of the obligor's original liability, § 5 (a), unless the amount of that liability is not known to the obligee, § 5 (b), or the obligee expressly reserves his rights against the co-obligors. § 4. The four States adopting the act are Nevada, Nev. Rev. Stat. c. 101 (1959); New York, N. Y. General Obligations Law §§ 15–101 to 15–109 (1964); Utah, Utah Code Ann. §§ 15–4–1 to 15–4–7 (1953); Wisconsin, Wis. Stat. Ann. §§ 113.01 to 113.10 (1957).

The Uniform Contribution among Tortfeasors Act, 9 U. L. A. 233, reverses the presumption arising from the absence of an express provision in the release. It enacts that "[a] release by the injured person of one joint tortfeasor . . . does not discharge the other tortfeasors

Kenna v. *Austin*, 134 F. 2d 659, 664–665 (CADC 1943) (announcing D. C. law); *Riley* v. *Industrial Finance Service Co.*, 157 Tex. 306, 311 (1957); and by the First Restatement, see Restatement, Torts § 885 (1) (1939); has been applied in a number of antitrust cases. See, *e. g.*, *Miami Parts & Spring, Inc.* v. *Champion Spark Plug Co.*, 402 F. 2d 83, 84 (CA5 1968); *Twentieth Century-Fox Film Corp.* v. *Winchester Drive-In Theatre, Inc.*, 351 F. 2d 925, 931 (CA9 1965); *Dura Electric Lamp Co.* v. *Westinghouse Electric Corp.*, 249 F. 2d 5, 6–7 (CA3 1957). It was this rule that the Court of Appeals followed in the opinion below. A final rule, which has gained support in several recent decisions and been adopted by the American Law Institute in a tentative draft of the Second Restatement of Torts, provides that the effect of a release upon coconspirators shall be determined in accordance with the intentions of the parties. See *Winchester Drive-In Theatre, Inc.* v. *Twentieth Century-Fox Film Co.*, 232 F. Supp. 556, 561–563 (ND Cal. 1964),

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unless the release so provides . . . ." § 4. The eight States which have adopted the Uniform Act are Arkansas, Ark. Stat. Ann. §§ 34–1001 to 34–1009 (1947); Delaware, Del. Code Ann. Tit. 10, §§ 6301–6308 (1953); Hawaii, Hawaii Rev. Laws §§ 246–10 to 246–16 (1955); Maryland, Md. Ann. Code Art. 50, §§ 16 to 24 (1957); New Mexico, N. M. Stat. Ann. §§ 24–1–11 to 24–1–18 (1953); Pennsylvania, Pa. Stat. Ann. Tit. 12, §§ 2082–2089 (1967); Rhode Island, R. I. Gen. Laws §§ 10–6–1 to 10–6–11 (1956); South Dakota, S. D. Comp. Laws §§ 15–8–11 to 15–8–22 (1967). Two States—Massachusetts and North Dakota—have adopted a slightly different 1955 revision of the act. See Mass. Gen. Laws Ann. c. 231B, §§ 1–4 (Supp. 1970); N. D. Rev. Code §§ 32–3801 to 32–3804 (Supp. 1957). Other States adopting statutes affecting the common law of release are Alabama, Ala. Code Tit. 7, § 381 (1940); California, Cal. Code Civ. Proc. §§ 875–880 (Supp. 1970); Louisiana, La. Civ. Code Art. 2203 (1952); Michigan, Mich. Stat. Ann. § 27A.2925 (1962); Missouri, Mo. Ann. Stat. § 537.060 (1953); Montana, Mont. Rev. Codes Ann. § 93–8108 (1964); West Virginia, W. Va. Code Ann. § 5481 (1961). The statutes last listed deal generally with the construction of instruments in suit and with the effect and form of releases in particular.

rev'd, *Twentieth Century-Fox Film Corp.* v. *Winchester Drive-In Theatre, Inc., supra; Young* v. *State*, 455 P. 2d 889 (Alaska, 1969); *Breen* v. *Peck*, 28 N. J. 351 (1958); Restatement, Second, Torts § 885 (1) (tent. draft no. 16, 1970); Comment, 12 Vand. L. Rev. 1414, 1416–1417 (1959).

We recently adopted the final rule giving effect to the intentions of the parties in *Aro Mfg. Co.* v. *Convertible Top Co., supra,* a patent infringement case. The agreement in that case expressly provided for the release of "Ford, its associated companies . . . [and] its and their dealers, customers and users of its and their products" from all past and future infringement claims. 377 U. S., at 493. The document, however, did not expressly reserve the releasor's rights against anyone. The issue in the case was whether Aro, a contributory infringer who did not fit within any of the special categories enumerated in the release, was nonetheless liable for its past contribution to infringements. The District Court had found that the parties had not intended to release contributory infringers such as Aro, and, despite the absence of an express reservation of rights against such infringers, we accordingly held that Aro was not entitled to benefit from the release. We concluded that a release, "which clearly intends to save the releasor's rights against a past contributory infringer, does not automatically surrender those rights." *Id.,* at 501.

We perceive no reason to follow a different rule in antitrust litigation. Indeed, of the three available rules, the rule adopted in *Aro* is most consistent with the aims and purposes of the treble damage remedy under the antitrust laws. We must keep in mind the multistate and multiparty character of much private antitrust litigation; often, defendants who have conspired together must be sued in a number of different States if all are to be reached, and, while defendants in some States may

be willing to enter into settlements, defendants in others may not. To adopt the ancient common-law rule would frustrate such partial settlements, and thereby promote litigation, while adoption of the First Restatement rule would create a trap for unwary plaintiffs' attorneys. The straightforward rule is that a party releases only those other parties whom he intends to release. Our conclusion that this is the appropriate rule for giving effect to releases under the antitrust laws is further buttressed by the Restatement's abandonment in a tentative draft of the rule requiring express reservation of rights in order to save them and its adoption of the rule to which we adhere. See Restatement, Second, Torts § 885, Comments a–d (tent. draft no. 16, 1970).

The intention of the parties to the 1957 release is absolutely clear from the contract made prior thereto in which they agreed to exchange releases.[12] That contract expressly provided for releases "to bind or benefit" the party and "the parent and subsidiaries of the party giving or receiving such release ('subsidiaries' to include corporations in which the party has stock ownership of 50% or more)."[13] We accordingly have no hesitancy in

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[12] Resort may be had to the contract in construing the release since the parole evidence rule is usually understood to be operative only as to parties to a document, and HRI here was not a party to the release. See *Stern* v. *C. I. R.*, 137 F. 2d 43, 46 (CA2 1943); *O'Shea* v. *New York, C. & St. L. R. Co.*, 105 F. 559, 562–563 (CA7 1901); Restatement, Second, Torts § 885, Comment d (tent. draft no. 16, 1970). See generally 9 J. Wigmore, Evidence § 2446 (3d ed. 1940).

[13] The contract provided in relevant part:

"1. . . . RCA, GE and Western Electric each to grant Zenith and Rauland, respectively, a general release and Zenith and Rauland each to grant RCA, GE and Western Electric, respectively, a general release, each such release, to the extent either party may request, to bind or benefit the parent and subsidiaries of the party giving or receiving such release ('subsidiaries' to include corporations in which the party has stock ownership of 50% or more)."

holding that HRI, which was neither a party to the 1957 release nor a parent or subsidiary of a party, is not now entitled to the benefits of that release.

Of course, to the extent that the $10,000,000 settlement which Zenith received in return for the 1957 release was understood by the parties to provide compensation for future damages that Zenith anticipated it would suffer during 1959–1963 as a result of the pre-1957 conduct of the Canadian pool, HRI would have available to it a defense of payment, for it is being ordered by the District Court to make full payment for all the 1959–1963 damages inflicted by all the members of the pool. It is settled that, entirely apart from any release, a plantiff who has recovered any item of damage from one coconspirator may not again recover the same item from another conspirator; the law, that is, does not permit a plaintiff to recover double payment. See *Aro Mfg. Co.* v. *Convertible Top Co., supra,* at 502–503 (plurality opinion); *McKenna* v. *Austin, supra,* at 665; Restatement, Torts § 885 (3) (1939); W. Prosser, Torts § 46 (3d ed. 1964). However, the record below indicates that a defense of payment could not here be sustained for, while the 1957 release did extend to future damages, the undisputed and unimpeached testimony of Zenith's witnesses was that the $10,000,000 settlement was understood by the parties as compensation only for Zenith's damages up to the date of the release. Thus, it is not surprising that, although HRI did advance a claim of payment upon its post-trial motion in the District Court, it has made no such argument in this Court. Since the claim was untimely presented below, was not pressed here, and is not sustainable on the facts contained in the record, we see no basis for its further consideration.

The judgment of the Court of Appeals is reversed, and the case is remanded, with instructions that the Court of Appeals reinstate the judgment of the District Court.

SUPREME COURT OF THE UNITED STATES

No. 80.—October Term, 1970

Zenith Radio Corporation, Petitioner, *v.* Hazeltine Research, Inc.	On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

[February 24, 1971]

Mr. Justice Harlan, with whom Mr. Justice Stewart joins, concurring in the result.

My review of the record in this case has left me with the firm conviction that the trial judge rejected Hazeltine's proffered defenses of release and the statute of limitations on the ground that they were too belatedly raised. I agree with the Court that such a course was within the trial judge's sound discretion. I therefore find it unnecessary to express any view on the remaining, difficult issues which the Court discusses.

A consideration of the posture of the case at the time of the trial judge's ruling facilitates an understanding of the record. Two years after the filing of Zenith's counterclaim, one year after the close of evidence, nine months after the filing of Hazeltine's post-trial brief, and two months after the trial judge had made preliminary findings of fact and conclusions of law, Hazeltine, represented by new counsel, raised for the first time its defenses of release and the statute of limitations. It also sought to dispute the quality and the sufficiency of the proof of damages with respect to the Canadian market, and it raised the issue of governmental embargoes in the English and Australian markets.

The District Judge heard two days of argument, covering nearly 200 pages of the Appendix, on both the merits of the contentions and the equity of allowing Hazeltine to raise them so belatedly. There were three main links in the chain of Hazeltine's reasoning in support of its contention that it should be allowed the benefit of the release and the statute of limitations. First, the defenses were meritorious and would bar a large portion of the enormous potential recovery. Second, Hazeltine's lateness in raising the defenses should be excused because Zenith's counterclaim and supporting affidavit gave no notice that Zenith intended to rely on any activities occurring before the filing of the answer in 1961, which was well within the limitation period under any theory. Third, Hazeltine should be excused for failing to spot the alleged shift in Zenith's theory of recovery during the course of the trial because Hazeltine's trial counsel was primarily a patent lawyer who was not completely at home in the antitrust field. App. 68–69, 72–74, 156–162.

The District Judge on at least three occasions observed that Hazeltine had been put on notice of Zenith's theory by the allegations of the counterclaim itself and by the pretrial briefs.[1] He repeatedly commented on trial counsel's failure to raise the defenses of release and the sta-

[1] For example: "Mr. Kayser [Hazeltine's counsel]: . . . it was not until during the trial, after we had the long Dodds affidavit and all of this testimony that suddenly, gradually this new theory starts to creep in, this new theory where we go back and try to recover again based on these allegedly wrongful acts many, many years ago.

"The Court: I must assume, to go along with that, that counsel at that time didn't read the pretrial brief which clearly set out, prior to the trial, this theory that you were taken by surprise by during the course of the trial." App. 158. See also App. 87, 144.

tute of limitations,[2] and in the course of colloquy more directly addressed to Hazeltine's other contentions he emphasized the necessity for trial counsel to prepare his

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[2] For example: "The Court: . . . [Reads from Hazeltine's post-trial brief.]

"Do you differ with counsel's statement, your prior counsel's statement 90 days after proofs were closed?

"Mr. Kayser: As to what the issues were that were presented in this case, yes, your Honor, I do. I most definitely do.

"The Court: Of course, you know by now that this is a new theory on your behalf.

"Mr. Kayser: Your Honor, I don't think it is a new theory. I think that——

"The Court: I mean, at least it wasn't advanced in this brief filed June 8, 90 days after the proofs closed.

"Mr. Kayser: Your Honor, we fully recognize the fact that the trial counsel did not realize what was happening to him. We fully realize that fact. If we had realized it——

"The Court: I mean, he didn't even realize it 90 days after the proofs were over.

"Mr. Kayser: Yes, your Honor. I quite agree." App. 72.

Later the following colloquy occurred:

"The Court: Do you agree with the theory that sometime litigation must end?

"Mr. Kayser: Yes, your Honor.

"The Court: And these offers of proof [with respect to embargoes by the English and Australian governments] are now being made more than one year after the proof closed on this case?

"Mr. Kayser: Your Honor, this I think is one of the most unusual cases that will come into a Courtroom, in that we have here, as I think we can demonstrate—without basis we have here the danger of a judgment of almost forty-nine million dollars which will spell corporate death, which is subject to the affirmative defenses of limitations and of releases. . . .

"The Court: I just got through instructing a jury that in deliberating on their verdict, they should not take into consideration either sympathy or prejudice.

. . . . . .

"Mr. Kayser: I submit most respectfully to this court that this court should take into account equity. This is not a matter of

case if the client was not to suffer.[3] After counsel for Zenith had presented his argument,[4] the District Judge heard Hazeltine's rebuttal, App. 223–250, with only one

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sympathy. This is a matter of equity and a matter of justice; that this judgment, which will spell the death of this corporation, has had absolutely no basis whatsoever. It is subject to affirmative defenses. It was accomplished by a subtle switch in theory. Maybe it should have been caught; maybe it shouldn't. But is your Honor going to penalize this corporation——

"The Court: I mean, it wasn't even caught 90 days after the proofs closed.

"Mr. Kayser: I agree, that's true. I agree. This is a very unusual case; we recognize that.

"The Court: You may proceed." App. 108–109. See also App. 71–76 *passim*, 158–161.

[3] For example: "The Court: . . . underlying what you are saying [with respect to the embargoes] is what is said so frequently in appeals in criminal cases, that they are where they are by virtue of incompetence of counsel.

"Now, there a person's liberty is involved, and what do the courts say in regard to this plea of incompetency of counsel?

"They say, first, was he counsel of your choice rather than appointed counsel? And if he was, the courts say, in regard to keeping men incarcerated and depriving them of their liberty, that unless the trial conducted by counsel of the prisoner's choice was such a farce, such a fraud that justice would be horrified by the result, that since you are represented by counsel of your choice, why, agreed that he might not be the greatest in the world, but he was your lawyer and you picked him out. You are going to have to remain incarcerated for the balance of your term.

"Now, how do we get around that analogy in this case?" App. 140–141.

Hazeltine's attorney responded in terms of his theory of surprise, whereupon the District Judge answered that federal procedure was based on notice pleading and in his opinion Hazeltine had been put on notice. App. 141–144.

See also, *e. g.*, App. 116, 121–123, 146, 155.

[4] App. 169–223. The District Judge asked for Zenith's views on the merits of the proposed defenses, but he did not press counsel on his reply. App. 186, 189, 193.

substantive question: "You do agree that the statute of limitations can be waived. You agree to that, don't you?" App. 237.

At the conclusion of his rebuttal argument, Hazeltine's attorney moved for leave to file "our affirmative defenses as a formal pleading of release and statute of limitations," and also moved to dismiss the counterclaim on the basis of those defenses. App. 250. The following colloquy then occurred:

> "The Court: Mr. McConnell [Zenith's counsel], do you care to address yourself very briefly to those two motions he just made? You will be limited to that.
>
> "Mr. Kayser: Sir?
>
> "The Court: Mr. McConnell—the ones that have to do with seeking to file these new pleadings on the statute of limitations.
>
> "Mr. McConnell: Well, the statute of limitations—this case is clearly distinguishable from the Emich case——
>
> "The Court: All he is doing is asking leave to file, and that is the only thing I wish to have you address yourself to.
>
> "Mr. McConnell: I think it's too late. He can make it for the record, but to actually file them in this case, the record is made. The case has been closed.
>
> "The Court: Well, the record will show that leave is given to file them at this time, after proofs are closed and after findings have been made.
>
> ". . . [The District Judge then stated how much he had enjoyed the argument of the past two days and complimented counsel on their presentations.]

> "The Court at this time is prepared to enter the final judgment and decree offered with the exception of . . . [the damages allegedly suffered in England and Australia.]" App. 250–251.

The judge then indicated that he would reopen the record to receive additional evidence with regard to the embargoes in England and Australia, but that the scope of the inquiry would be narrowly limited, and in particular no relitigation of facts adduced at trial would be permitted. The judge explained, "I do feel that in order to satisfy myself, in order to do equity in this matter, that I would like, to the limited extent expressed, a reopening in regard to the matters that I have indicated that do trouble me by virtue of the offers of proof that have been made and the statements that have been made in regard solely to Australia and England." App. 252–253. Except for giving Hazeltine's counsel five days in which to file his affirmative defenses, the judge made no other relevant comments in ruling on the motions.

I find it impossible to believe that the judge ruled thus summarily on the merits of the complicated issues of antitrust law to which this Court devotes 15 printed pages. I also find it highly unlikely that, without a word of explanation for departing from the sentiments he expressed during argument, the judge intended to forgive Hazeltine's failure to raise the defenses earlier. To be sure, he must have considered the merits sufficiently to satisfy himself that refusal to allow Hazeltine to raise these defenses worked no gross inequity. See Fed. Rule Civ. Proc. 15 (a). I remain convinced, however, that he rejected the defenses only as untimely raised.

Believing that the Court of Appeals clearly erred in reaching the opposite conclusion,[5] I concur in the judgment of the Court on that ground.

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[5] The opinion of the Court of Appeals gives no indication that its attention was drawn to the remarks of the District Judge during Hazeltine's argument in chief, which cast light on his ruling on the motion for leave to file. Its entire discussion of the basis for the District Court's action reads as follows:

"Zenith's counsel objected to the filing of the defenses on the ground that they came too late and were waived. The district court, however, permitted the defenses to be filed and thereafter denied HRI's motion for judgment based on the defenses. . . . [The Supreme Court left open the question whether this ruling was on the merits.] It is our view that the court's ruling was not on the basis of waiver, but because the defenses on their merits did not bar Zenith's recovery." 418 F. 2d, at 23–24.